Supreme Court, U.S.
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No. 00-____

In the Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 252 of the federal Telecommunications Act of 1996 ("1996 Act") requires incumbent local exchange carriers ("LECs"), like Ameritech, to enter into interconnection agreements with competing LECs. And those section 252 agreements are the Congressionally-mandated vehicles for implementing the requirements of the 1996 Act and FCC regulations.

The question presented is:

Whether a claim that a state commission determination concerning the rights and obligations of the parties to a section 252 agreement deviated from the plain terms of that agreement lies within the scope of federal jurisdiction under section 252(e)(6).

LIST OF PARTIES TO THE PROCEEDING BELOW

AT&T Communication of Illinois, Inc.

Brent S. Bohlen, in his official capacity as a Commissioner of the Illinois Commerce Commission

Focal Communications Corporation

Terry Harvill, in his official capacity as a Commissioner of the Illinois Commerce Commission

Edward C. Hurley, in his official capacity as a Commissioner of the Illinois Commerce Commission

Illinois Bell Telephone Company d/b/a Ameritech Illinois

Richard Kolhauser, in his official capacity as a Commissioner of the Illinois Commerce Commission

Ruth Kretschmer, in her official capacity as a Commissioner of the Illinois Commerce Commission

Richard Mathias, in his official capacity as a Commissioner of the Illinois Commerce Commission

Karl McDermott, in his official capacity as a Commissioner of the Illinois Commerce Commission

MCIMetro Access Transmission Services, Inc.

MCI Telecommunications Corporation

Dan Miller, in his official capacity as a Commissioner of the Illinois Commerce Commission

Mary F. Squires, in her official capacity as a Commissioner of the Illinois Commerce Commission

Teleport Communications Group, Inc.

Worldcom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc.

RULE 29.6 STATEMENT

Petitioner Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals as amended (Pet. App. 1a-17a) is reported at 179 F.3d 566 (7th Cir. 1999). The order of the court of appeals denying the petitions for rehearing (filed by the Commissioners of the Illinois Commerce Commission) and for rehearing with suggestion of rehearing en banc (filed by Ameritech) (Pet. App. 18a-19a) is unreported. The orders of the district court (Pet. App. 20a-62a) and the Illinois Commerce Commission (Pet. App. 63a-87a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1999, and amended on August 19, 1999. Petitions for panel rehearing and for rehearing with suggestion of rehearing en banc were denied on August 9, 2000. On October 10, 2000, Justice Stevens granted an extension for the filing of this petition for a writ of certiorari to November 28, 2000. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court under 47 U.S.C. § 252(e)(6) and 28 U.S.C. §§ 1331 and 1337. Jurisdiction in the court of appeals was proper under 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED[1]

U.S. Const., Art. III, § 2, cl. 1

47 U.S.C. § 252

STATEMENT

A. Federally Mandated Interconnection "Agreements" Under The Telecommunications Act of 1996. This case arises under the federal Telecommunications Act of 1996, Pub.

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[1] The pertinent text of these provisions is set forth in the appendix.

L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). As Justice Scalia's opinion for the Court explained, "the question" under the Act "is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. *With regard to the matters addressed by the 1996 Act, it unquestionably has.*" *Id.* at 378 n.6 (emphasis added).

The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Sections 251 and 252 of the Act govern the formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the

incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

The question here is whether a claim that a state commission has failed to enforce express Act-based limitations on the "binding" obligations prescribed by a section 252 interconnection "agreement" presents a federal question that is reviewable in federal court. In view of the pervasively federal nature of these agreements — the federal source of the agreements themselves and of the obligations that they implement and impose — it would be anomalous to treat such a claim like an ordinary contract dispute that has no relationship to a federal regulatory program. Yet that it precisely how the Seventh Circuit viewed Ameritech's claim in holding that only "a state forum can supply a remedy" for such a claim. Pet. App. 17a. In reaching this result, the Seventh Circuit noted that its decision — which has the effect of requiring parties that are aggrieved by state commission determinations relating to section 252 agreements to bring two actions, one in federal and the other in state court — had "potential to cause problems" and "may not have much to

recommend it." *Id.* Still, the Seventh Circuit read the Act's judicial review scheme to require such an odd result. Two other circuits and the FCC, by contrast, have treated the same claim as subject to review in the federal courts. This Court's guidance is needed to resolve this split of authority on this important federal jurisdiction issue, which has arisen, and will continue to arise, repeatedly as telecommunications carriers, state and federal regulators, and the courts implement Congress's design for promoting competition in local telephone markets.

B. The Process For Entering Into A Section 252 Interconnection Agreement. Section 252 of the Act prescribes the process through which a competing LEC may arrive at an agreement with an incumbent LEC for the performance of the duties established in section 251. The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1).

In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when

the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously-approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2). And any post-approval "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" also lies within "the states' 'responsibility' under section 252" of the Act. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC No. 00-216, ¶ 6 (rel. June 14, 2000) ("*Starpower*"). As the FCC has observed, "interconnection agreements will continue to pose important questions of federal law even after their initial approval," and "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 19 (8th Cir. filed Mar. 22, 2000).

As the foregoing demonstrates, state regulators who participate in the federal scheme are not simply "allowed to do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators comply with the Act is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the

rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by a "determination" under section 252 to bring an action in "Federal district court" to determine whether the final agreement "meets the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the Federal Communications Commission ("FCC") performs the regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "deputized federal regulator[s]" (*MCI Telecomm. Corp.* v. *Illinois Bell Tel. Co.*, 222 F.3d 323, 344 (7th Cir. 2000), petitions for cert. filed, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (No. 00-653), 69 U.S.L.W. ___ (U.S. Nov. 6, 2000) (No. 00-744)), the Act mandates that the FCC "shall issue an order preempting the State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). The FCC's obligation to stand in the shoes of non-participating state regulators extends to every aspect of the regulatory responsibilities under section 252, including the interpretation and enforcement of disputed terms of an agreement. *Starpower*, ¶¶ 6-9. And like state commission "determinations under section 252," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by the state commissions or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is

surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the application of federal telecommunications law, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

C. The Interconnection Agreements At Issue. Because section 252 agreements implement the requirements of the Act, parties to those agreements often use language that "tracks the controlling law" in order to make clear that their obligations conform to those imposed by Act. The Fourth Circuit has expressly recognized this fact, concluding that "[w]here a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law," and therefore is intended to "comply with" and implement "the requirements of the Act." *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000).

As required by the Act, Ameritech entered into an interconnection agreement with several competing LECs. Those agreements clearly state that the parties' rights and duties are what federal law says they are, generally and with respect to reciprocal compensation in particular. Of the agreements at issue in this case, four state that they "set forth * * * the terms and conditions under which the Parties interconnect their networks and provide other services *as required by the Act* as set forth herein." The fifth provides that "[t]he parties acknowledge that [their] respective rights and obligations * * * are based on the text of the Act and the rules and regulations promulgated thereunder by the FCC and the Commission as of the Effective Date."

As required by section 251(b)(5) of the Act, the agreements establish reciprocal compensation arrangements between the parties. And, again, those arrangements are "as required by the Act." The reciprocal compensation provision in each agreement appears under a heading that cites the reciprocal compensation provision in the Act: "Reciprocal Compensation Arrangements - Section 251(b)(5)." All five agreements specifically provide that the parties' reciprocal compensation arrangements are "As Described in the Act" (SA48; SA57; SA80; SA89; SA100)[2], which is in turn defined in each agreement to mean "as described in or required by the Act" (SA39; SA53; SA71; SA85; SA96).

D. The Proceedings Below. In 1997, respondents filed complaints against Ameritech in the Illinois Commerce Commission ("ICC"), alleging that Ameritech had failed to comply with its obligation to pay reciprocal compensation on Internet traffic under its section 252 interconnection agreements. As noted above, those agreements provided in relevant part that the parties' reciprocal compensation arrangements are "As Described in the Act," which is in turn defined to mean "as described in or required by the Act." The ICC Commissioners, invoking "jurisdiction under the [Illinois] Public Utilities Act and Section 252 of the Telecommunications Act of 1996 * * * to interpret and enforce the terms of interconnection agreements" (Pet. App. 77a), agreed with respondents. The Commissioners held that "by discontinuing its reciprocal compensation payments" on Internet traffic, Ameritech violated "its interconnection agreements, and its duty under the Act." *Id.* at 78a-79a. The district court upheld the Commissioners' determination, characterizing the issue as "whether LECs are entitled to reciprocal compensation

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[2] "SA" refers to Ameritech's Separate Appendix in the court of appeals.

pursuant to section 251(b) of the Telecommunications Act for" Internet-bound traffic (*id.* at 38a), and holding that the ICC did not err in determining that the agreements and section 251(b)(5) do, in fact, require reciprocal compensation on such traffic. *Id.* at 43a-50a.

On appeal to the Seventh Circuit, Ameritech argued that (i) "the Act does not require reciprocal compensation" on Internet traffic, (ii) "the agreements precisely track the Act (reciprocal compensation is 'As Described in the Act')," and (iii) "therefore the agreements cannot require reciprocal compensation for calls to ISPs." Pet. App. 12a. In other words, Ameritech did not argue that the Act *prohibited* reciprocal compensation on Internet calls, but rather that (i) the Act did not *require* it, and (ii) the section 252 agreements limited Ameritech's reciprocal compensation obligations to the requirements of the Act. Despite the court's earlier statement that "[d]ecisions of state agencies implementing the 1996 Act are reviewable in federal district courts" (*Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)), the Seventh Circuit declined to answer the question posed by Ameritech's appeal. Instead, the court held that it lacked jurisdiction to decide whether the Commissioners erred in holding that the section 252 agreements required the payment of reciprocal compensation on Internet calls. Pet. App. 17a. As the court explained, a claim that the Commissioners "'interpret[ed]' the agreement contrary to its terms * * * creates a different kind of problem -- one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* Thus, the court summarized that its "task" under section 252(e)(6) was simply to determine whether the ICC Order "*violates* federal law." *Id.* (emphasis added). In that regard, the court refused to adjudicate Ameritech's *claim* that the ICC failed to enforce the provisions of the section 252

agreements that limited Ameritech's reciprocal compensation obligations to those "described in or required by the Act."

REASONS FOR GRANTING THE PETITION

Section 252 interconnection agreements are the Congressionally-mandated vehicles for implementing the local competition provisions of the landmark federal Telecommunications Act of 1996. In the almost five years since the Act became law, carriers have entered into thousands of interconnection agreements across the country, and state commissions have determined the rights and obligations under the Act and under countless of those agreements. In carrying out their duties, state commissions have exercised authority delegated to them under the Act to implement the requirements of the federal regulatory scheme. And section 252(e)(6) of the Act expressly provides that any party aggrieved by any determination of a state commission under section 252 of the Act may bring an action in federal district court to determine whether the state commission action meets the requirements of federal law. The question in this case is whether a claim that a state commission determination concerning the rights and obligations of the parties to a section 252 agreement that deviated from the plain terms of that agreement lies within the scope of federal jurisdiction under section 252(e)(6).

The courts of appeals are divided on this question. See *BellSouth Telecommunications* v. *MCIMetro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1376 n.10 (N.D. Ga. 2000) (noting that "[t]here currently exists a circuit split concerning the scope of federal review" in the context of challenges to state commission determinations "construing and enforcing" section 252 interconnection agreements). The decision below held that only "a state forum can supply a remedy" for such a claim. Pet. App. 17a. The Eighth and Fifth Circuits have disagreed. Both of those courts have found that

federal courts have jurisdiction to decide the merits of a claim that a state commission has disregarded express limitations on a scope of a carrier's obligations under a section 252 agreement — although those courts have not followed a uniform rationale for their holdings. The FCC also disagrees with the Seventh Circuit, treating a claim like the one asserted here by Ameritech as federal in nature, and thus subject to review in the federal courts. In short, the resolution of the question presented in the courts of appeals and the FCC to date reveals considerable and growing confusion with respect to the scope of federal jurisdiction to review determinations concerning interconnection agreements, whether those determinations are made by a state commission or by the FCC standing in the shoes of a state commission under section 252(e)(5) of the Act.

Only this Court can put an end to the confusion by adopting a rational and uniform national standard for federal jurisdiction over disputes concerning the linchpin of the Act's local competition goals — section 252 interconnection agreements. These "agreements," as Ameritech has explained, incorporate a "host of duties" that the Act imposes on incumbent LECs. *AT&T Corp.*, 525 U.S. at 371. Because many of these duties are mandatory, parties often use language that "tracks the controlling law." Such provisions, the Fourth Circuit has held, should be presumed to have been "negotiated *with regard to* the 1996 Act," and accordingly draw their meaning from the Act. *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (emphasis added). The agreement provisions at issue here plainly track the Act, and thus fall within the ambit of the Fourth Circuit's ruling.

Section 252 agreements are federal to their very core. And the FCC's treatment of a materially indistinguishable claim in *Starpower* vividly demonstrates that the federal agency charged with performing the same duties as the state commissions under

the Act has rejected the Seventh Circuit's bifurcated review scheme. *Starpower* makes clear that a claim that a federally-authorized regulator made a determination concerning the rights and obligations of the parties to a section 252 interconnection agreement that nullified the express terms of that agreement arises under federal law and is subject to review under section 252(e)(6). In view of the parallel scheme for state and federal regulation of interconnection agreements set forth in the Act, it is equally clear that an identical state commission determination is reviewable in federal court under section 252(e)(6). Any other construction of the Act's judicial review scheme would be absurd, for Congress would not have insisted on review of an expert *federal* agency by a federal court of appeals without providing for federal review of the identical determinations of *state* regulators under the same federal statutory scheme. In view of the sensible construction of section 252(e) reflected in *Starpower* and in the Eighth Circuit's decision in *Connect*, the Seventh Circuit's anomalous notion that state commission determinations issued under the authority of *federal* law to implement *federal* law obligations under *federally* mandated agreements should be reviewable only in *state* court simply makes no sense and should be rejected.

The existing confusion in the courts of appeals does not involve a mere academic dispute with few or no real world consequences. To the contrary, the large volume of disputes over the terms of interconnection agreements, coupled with the enormous importance of those agreements to the achievement of Congress' regulatory (indeed, deregulatory) purposes, demonstrates the great importance of a uniform, rational federal review procedure. This court's review is plainly warranted.

I. THE SEVENTH CIRCUIT'S DECISION ON THE SCOPE OF JURISDICTION UNDER THE 1996 ACT'S JUDICIAL REVIEW PROVISIONS CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND THE FCC.

A. The courts of appeals are in conflict as to the scope of federal jurisdiction over disputes concerning the interpretation and enforcement of interconnection agreements that are entered into pursuant to — and mandated by — section 252 of the federal Telecommunications Act of 1996. The decision below holds that federal courts lack jurisdiction to decide the merits of a *claim* that a state commission failed to enforce provisions of a section 252 agreement that limit a carrier's obligations to the requirements of the Act, because it is a claim "for which a state forum can supply a remedy." Pet. App. 17a. That decision conflicts with decisions of the Eighth Circuit in *Southwestern Bell Tel.* Co. v. *Connect Communications Corp.*, 225 F.3d 943 (8th Cir. 2000), and the Fifth Circuit in *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n*, 208 F.3d 475 (5th Cir. 2000), both of which held that a claim that a state commission has disregarded express limitations on the scope of a carrier's obligations under a section 252 interconnection agreement is reviewable in federal court.

Moreover, the decision below conflicts with the FCC's Order in *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, FCC No. 00-216 (rel. June 14, 2000) ("*Starpower*"), which treats a claim identical to the claim that was before the Seventh, Eighth, and Fifth Circuits in the aforementioned cases as being federal in nature and thus reviewable in the federal courts. Finally, the decision below cannot be reconciled with the Fourth Circuit's recent decision in *AT&T Communications of Southern States,*

Inc. v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000), which demonstrates that the interpretation of a provision of a section 252 agreement that tracks the language of the Act necessarily requires a court to construe the Act — and therefore presents a question of federal law.[3]

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[3] The federal courts of appeals, including the Seventh Circuit in the decision below, uniformly have held that (i) state commissions are authorized under the 1996 Act to interpret and enforce section 252 interconnection agreements, and (ii) decisions interpreting and enforcing those agreements constitute "determinations under section 252." See, *e.g.*, *Connect*, 225 F.3d at 947 ("the state commission's power to enforce a federally-mandated interconnection agreement arises from § 252, and thus a state commission's decision enforcing the agreement is a 'determination' under that section"); *MCI*, 222 F.3d at 338, 341 (holding that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission" and that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place"); *Southwestern Bell*, 208 F.3d at 479-80, 481 (noting that "the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved" and holding that "district courts have jurisdiction to review * * * interpretation and enforcement decisions of the state commissions"); Pet. App. 7a-8a (noting that "subsection 252(e)(6) provides for judicial review of 'state commission actions,' not simply review of 'interconnection agreements'" and that "suits reviewing 'actions' by state commissions * * * were to be brought exclusively in the federal courts"). See also *Puerto Rico Tel. Co.* v. *Telecomms. Regulatory Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999) (holding that a state commission action constitutes "a 'determination' under § 252" and thus "fall[s]

B. Despite its prior statement that "[d]ecisions of state agencies implementing the 1996 Act are reviewable in federal district courts" (*Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)), the Seventh Circuit held in this case that "[a] decision 'interpreting' an agreement contrary to its terms creates a * * * problem * * * under the law of contracts * * * for which a state forum can supply a remedy." Pet. App. 17a. Under the panel's decision, therefore, Ameritech's claim that the ICC failed to enforce express limitations on the scope of Ameritech's obligation to pay reciprocal compensation under its federally-mandated interconnection agreements presents a question reviewable only in state court — notwithstanding the facts (i) that the Act specifically provides (47 U.S.C. § 252(a)) that the terms of such agreements are "binding" as a matter of federal law, (ii) that the obligation to pay reciprocal compensation is mandated by section 251(b)(5) of the Act, and (iii) that Ameritech's *claim* in this case is that the specific section 252 agreements at issue here expressly limit the payment of reciprocal compensation to instances where such payment is "required by the Act."

As the panel recognized, its construction of the Act creates a bifurcated "allocation of authority," pursuant to which review of state commission determinations with respect to section 252 agreements encompassed in the same order would be divided between federal and state courts. Pet. App. 17a. The panel also

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within the jurisdictional bounds of § 252(e)(6)," if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement"). The FCC has reached precisely the same conclusions. *Starpower* ¶¶ 6, 9 (holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252" and assuming jurisdiction over interpretation dispute subject to "judicial review of [its] findings" under section 252(e)(6)).

acknowledged that "[t]his allocation of authority has a potential to cause problems," and therefore "may not have much to recommend it," because "every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer 'no.'" *Id.*

The Seventh Circuit's construction of the Act's review scheme thus requires an aggrieved party to file two lawsuits every time that it claims that a state commission has refused to enforce a provision in a section 252 agreement that limits the party's obligation to the requirements of the Act. *Id.* at 17a. As explained below, this construction of the Act's judicial review scheme is both manifestly erroneous and contrary to the decisions of the Eighth and Fifth Circuits and the FCC. Moreover, the Seventh Circuit's approach raises grave Article III concerns, because it requires federal courts to give advisory answers to hypothetical questions. See *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 461 (1945) ("This Court is without power to give advisory opinions" and does not "decide abstract, hypothetical, or contingent questions"). Under the Seventh Circuit's bifurcated review procedure, the federal courts must decide whether the state commission's determinations of the parties' rights and obligations under a section 252 agreement violate federal law before any court has decided whether the state commission's determinations of those rights and obligations were substantively correct. In other words, the federal courts must decide whether the agreement would violate federal law *if* it means what the state commission said it means. The federal courts' decision in this context would be a wholly advisory because the state courts subsequently may moot the "violation" question altogether by answering the predicate question — whether the state commission correctly interpreted the

agreement — in the negative. The Seventh Circuit's decision thus implicates the Article III prohibition on advisory opinions. See, *e.g.*, *Muskrat* v. *United States*, 219 U.S. 346, 356-57 (1911); *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792).

C. Not surprisingly, no other court of appeals has followed the Seventh Circuit's strained construction of the Act's judicial review provisions. To the contrary, the Eighth and Fifth Circuits have concluded that federal courts have authority to adjudicate the merits of a claim that a state commission has failed to enforce express limitations on the obligations of parties to a section 252 agreement.

In *Connect*, the Eighth Circuit held that the federal courts have jurisdiction over a claim brought by an incumbent LEC that challenged a state commission's determination that the incumbent owed reciprocal compensation on Internet calls under the terms of a section 252 interconnection agreement. In reaching that conclusion, the Eighth Circuit reversed a district court that expressly had relied on the Seventh Circuit's decision below in dismissing Southwestern Bell's action for lack of subject matter jurisdiction. *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 72 F. Supp. 2d 1043, 1049 (E.D. Ark. 1999).[4] As the Eighth Circuit noted, in its dismissal order the district court had "relied upon" the argument that "interpretation and enforcement determinations do not present questions about whether 'the agreement or statement meets the requirements' of §§ 251 and 252" of the Act. 225 F.3d at 946-47. In particular, "the District Court ruled that [section 252(e)

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[4] The district court in *Connect* further explained that the incumbent LEC "has unsuccessfully tried to make a federal question out of an issue that is properly characterized as a matter of state contract law," noting that "the parties must turn to the wording of their 1997 Agreement" to answer the dispositive question in the case. 72 F. Supp. 2d at 1050.

of the Act] 'does not give the federal district courts jurisdiction to review a state commission's interpretation and enforcement of a privately negotiated interconnection agreement because that is a matter of state contract law that should properly be reviewed by a state court.'" *Id.* at 947 (quoting 72 F. Supp. 2d at 1049).

The Eighth Circuit "disagree[d]" with the district court's rationale and decision in rejecting the notion that "contract interpretation and enforcement is an issue of common law that properly belongs in the jurisdiction of state courts." *Id.* Under the Eighth Circuit's ruling, the federal courts have jurisdiction to decide the merits of the precise claim asserted here — namely, that a state commission erroneously resolved a complaint by a competing LEC that an incumbent LEC had breached the terms of a section 252 interconnection agreement by not providing reciprocal compensation for Internet calls. See *id.* at 947-48; see also *id.* at 949 (M. Arnold, dissenting) (disagreeing with majority's conclusion on jurisdiction on ground that state law provides right of action "in case of a breach" of an interconnection agreement).

The Fifth Circuit also has rejected the Seventh Circuit's bifurcated review scheme, holding instead that federal courts may adjudicate a challenge to a state commission's determination regarding the scope of the parties' rights and obligations under a previously approved section 252 interconnection agreement. *Southwestern Bell*, 208 F.3d at 481-82. In declining to follow the Seventh Circuit, the Fifth Circuit noted the potential problems associated with the "quite narrow" scope of federal review under the bifurcated scheme adopted by the Seventh Circuit, *id.* at 481 & n.7, and concluded that a "broader view" of section 252(e)(6) was "appropriate." *Id.* at 482. The court thus reached the merits of the very claim that "remain[ed] open for determination" in state court under the Seventh Circuit's interpretation of the Act's judicial review

scheme: "that the language in the agreements parallels the reciprocal compensation requirement in section 251(b)(5) of the Act; that the FCC has declared that Internet traffic is not encompassed within section 251(b)(5) of the Act; ergo, as a matter of federal law, the calls are not 'local' and reciprocal compensation is therefore not required." *Id.* at 484. As one district court addressing yet another challenge to a state commission's determination as to the scope of an incumbent LEC's obligations under the reciprocal compensation provisions of a section 252 interconnection agreement noted, as a result of the Fifth Circuit's decision (and the Eighth Circuit's subsequent decision in *Connect*), "[t]here currently exists a circuit split concerning the scope of federal review" in the context of challenges to state commission determinations "construing and enforcing" section 252 interconnection agreements. *BellSouth Telecommunications* v. *MCIMetro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1376 n.10 (N.D. Ga. 2000).[5]

D. The decision below also conflicts with the FCC's recent decision in *Starpower*, in which the FCC — in a decision entitled to *Chevron* deference and subject to review exclusively in the federal courts or appeals under the Hobbs Act —

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[5] Although the Fifth Circuit correctly rejected *Illinois Bell's* unusual bifurcated scheme, the Fifth Circuit's jurisdictional analysis missed the mark in suggesting (*see* 208 F.3d at 481) that "state law principles govern the questions of interpretation of the contracts and enforcement of their provisions." As demonstrated below, a claim challenging a determination regarding the scope of the parties' rights and obligations under a section 252 agreement (whether by a state commission or by the FCC) — a determination issued under the authority of federal law with respect to an agreement mandated by federal law that implements federal law obligations and expressly limits those obligations to the requirements of federal law — should be resolved under federal law.

concluded that any regulatory determination under section 252, whether by a state commission or by the FCC, interpreting an interconnection agreement presents a question of federal law that is reviewable in federal court. *See Starpower*, ¶¶ 6-9. In *Starpower*, as here, a competing LEC initiated a complaint proceeding before a state commission "with respect to a dispute concerning the interpretation and enforcement of its interconnection agreements" with two incumbent LECs. *Starpower*, ¶ 1. In particular (again, as in this case), the competing LEC claimed that the incumbent LECs owed reciprocal compensation on Internet traffic pursuant to the terms of their section 252 interconnection agreements. *Id.*, ¶ 3. The state commission refused to resolve this dispute over the scope of the obligations imposed by those agreements. *Id.*, ¶ 4. The competing LEC then requested that the FCC determine the rights and obligations of the parties under their section 252 agreement pursuant to its authority (47 U.S.C. § 252(e)(5)) to preempt the jurisdiction of a state commission that fails to perform its section 252 duties. *Id.*, ¶ 1.

The FCC first determined that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252" of the 1996 Act. *Starpower*, ¶ 6. The FCC then concluded that the state commission's refusal to resolve the specific agreement interpretation dispute before it concerning "inter-carrier compensation for ISP-bound traffic" constituted a "failure to act" within the meaning of section 252(e)(5). *Id.*, ¶ 7. Accordingly, the FCC preempted the state commission's jurisdiction to interpret the section 252 interconnection agreement and noted that it would "proceed to resolve only the question that the Virginia Commission would have resolved had it chosen to act: ***whether the existing interconnection agreements between Starpower and GTE and Bell Atlantic require GTE and Bell Atlantic to pay***

compensation to Starpower for the delivery of ISP-bound traffic." *Id.*, ¶ 9 (emphasis added). In addition, paraphrasing the judicial review provisions in section 252(e)(6) of the Act, the FCC added that "any findings made by the Commission after it assumes responsibility over a proceeding and any judicial review of such findings shall be the exclusive remedies available to the parties." *Id.*

The FCC's construction of the 1996 Act thus establishes that the resolution of a dispute over the scope of obligations prescribed by a section 252 interconnection agreement constitutes a "determination under [section 252]," and thus is reviewable in federal court under subsection 252(e)(6). Under section 252(e)(5), the bounds of the FCC's authority to stand in the shoes of a state commission are marked by the state commission's "fail[ure] to act to carry out its responsibility *under this section*" (emphasis added). Accordingly, if a dispute over the scope of the obligations prescribed by a section 252 agreement were not deemed to give rise to a section 252 determination, the FCC would lack authority to act in place of a state commission where, as in *Starpower*, the "only" issue requiring the exercise of federal regulatory authority is the proper interpretation of an interconnection agreement. *Starpower*, ¶ 9.

Moreover, *Starpower* makes clear not only that the FCC has the power to resolve such a claim, but also that the FCC's determination is subject to review in the federal courts of appeals. *Starpower*, ¶ 9 ("any findings made by the Commission after it assumes responsibility over a proceeding and any judicial review of such findings shall be the exclusive remedies available to the parties") (citing 47 U.S.C. § 252(e)(6)). In view of the parallel scheme established under the Act, it would make no sense for Congress to have insisted that the federal courts of appeals superintend the determinations of the FCC — a *federal* agency that can be presumed to be highly

sensitive to federal interests — without requiring at least as much federal oversight of the identical state commission determinations. Indeed, given the highly unorthodox circumstance presented by state agency regulation under a federal program, it would be "surpassing strange" if Congress did not intend to secure national uniformity through federal court review of state commission actions under section 252(e)(6) of the Act — when it provided for review in the federal courts of appeals of the identical FCC determination.

E. As the foregoing discussion demonstrates, the circuits are divided on the question whether the federal courts have jurisdiction to resolve on the merits a claim that a state commission had failed to enforce express Act-based limitations on the obligations prescribed by a section 252 interconnection agreement. Two circuits and the FCC (in an Order that is entitled to *Chevron* deference and that is reviewable exclusively in the federal courts of appeals under the Hobbs Act) have held that federal jurisdiction does exist over such a claim, although the two circuits have not followed the same reasoning in reaching that conclusion. The decision below held that such a claim cannot be heard in federal court, but instead must be decided in state court under a bifurcated review scheme that requires two lawsuits to be filed in each dispute over the scope of obligations imposed by a section 252 interconnection agreement.

In view of (i) the importance of interconnection agreements as the primary vehicles for implementing the local competition provisions of the 1996 Act, (ii) the thousands of interconnection agreements that have been (or currently are being) negotiated, arbitrated, and approved nationwide, and (iii) the scores of disputes over the meaning of the terms of those agreements that have arisen (and are bound to arise in the future), Ameritech respectfully submits that this Court's intervention is urgently needed. The multiplicity of approaches between the circuits is

a recipe for unnecessary complexity and confusion, particularly for carriers who operate in multiple circuits and thus may be subject to two (or more) judicial review schemes. Only this Court can pronounce a uniform national rule.

II. THE SEVENTH CIRCUIT'S DECISION IS MANIFESTLY ERRONEOUS.

A. The Seventh Circuit clearly erred in characterizing a claim seeking review of a state commission's interpretation of an agreement that limits a carrier's obligations to the requirements of the Act as a state law claim. Such a claim is demonstrably federal in nature. The Act not only mandates that carriers enter into interconnection agreements (47 U.S.C. § 251(c)(1)), but also dictates much of the content of such agreements (see *AT&T Corp.*, 525 U.S. at 371). The duty to make arrangements for the payment of the reciprocal compensation that is ultimately at issue in this case is just one example of the "host of duties" that the Act imposes on incumbent LECs. *Id.* Congress plainly intended that section 252 interconnection agreements would implement the substantive federal requirements set forth in sections 251 and 252 of the Act and its implementing regulations. Section 252 agreements thus are not run-of-the-mill private contracts (as the decision below suggests), but instead are brand new federal regulatory vehicles that require incumbent carriers like Ameritech to interact with their competitors in ways that are dictated by the requirements of the 1996 Act and the FCC's implementing regulations.

Indeed, the source and content of the parties' obligations under an interconnection agreement can be traced directly to the text of the Act. Federal law creates both the substantive duties (for example, the duty to pay reciprocal compensation, 47 U.S.C. § 251(b)(5)) that an interconnection agreement must implement and the procedural obligation to negotiate an

agreement to implement those duties (see *id.* § 251(c)(1)). Federal law also requires incumbent LECs to provide service "in accordance with the terms and conditions of the agreement" (*e.g.*, *id.* § 251(c)(2)(D)) and to make the components of an approved agreement available to "any other requesting telecommunications carrier upon the same terms and conditions." *Id.* § 252(i). And the federal nature of these obligations is further underscored by the fact that incumbent LECs would be required to adhere to their section 251 and 252 obligations even if such obligations were illegal under state law. See *id.* § 261. Finally, and perhaps most significantly for present purposes, federal law establishes the right of carriers to "enter into a binding agreement" shaped solely by their mutual consent. See *id.* § 252(a)(1).

Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously-approved agreement. To the contrary, the plain language of the Act guarantees each carrier the right to have its obligations limited to the specific terms incorporated in its "binding" interconnection agreements. *Id.* § 252(a)(1). And where, as here, a carrier claims that a state commission has made a determination that does alter the terms of a section 252 agreement, thereby imposing obligations which that carrier neither consented to nor was forced to accept under the Act, the carrier has stated a claim under federal law — namely, that the state commission's decision has deprived the carrier of an important substantive right under the Act. Such a claim plainly tests whether a agreement "meets the requirements of" section 252 of the Act, and thus is reviewable in federal court under section 252(e)(6).

Because section 252 interconnection agreements implement the requirements of the Act, parties often use language that

"tracks the controlling law" in order to indicate their intention of conforming their obligations to those imposed by Act, no more and no less. Particularly in negotiating the first generation interconnection agreements — before the new federal interconnection requirements had been given shape through experience and judicial interpretation — incumbent LECs had no incentive to give more, and competing LECs had no incentive to take less, than the Act required.

The Fourth Circuit expressly took this obvious fact into consideration in construing the Act, observing that "[w]here a provision plainly tracks the controlling law, there is a strong presumption that the provision was negotiated with regard to the 1996 Act and controlling law," and therefore is intended "to comply with" and implement "the requirements of the Act." *AT&T Communications of Southern States, Inc.* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). Indeed, the Fourth Circuit added that it would "stretch the bounds of imagination" to construe a provision that tracks the Act to mean that the parties intended to override the Act. *Id.* For these reasons, the Fourth Circuit held that "provisions so negotiated and agreed upon may be reformed if the controlling law changes." *Id.* The Seventh Circuit, however, failed to recognize the practical reality that underpins this "strong presumption." Accordingly, the Seventh Circuit viewed the fact that the parties expressly limited their obligations to the requirements of the Act as irrelevant to the jurisdictional issue, because the court saw no need to discern the meaning of federal law or to ensure that the reciprocal compensation obligations that it imposed on Ameritech were commensurate with the requirements of federal law. The Fourth Circuit, by contrast, recognized that the courts may need to "reform" a provision that was negotiated "with regard to" the Act so that the provision, as interpreted in light of substantive changes in the

controlling law, continues to "track" the requirements of the Act.

B. If the fact that a state commission determination interpreting and enforcing a section 252 agreement is issued under the authority of *federal* law in order to implement the requirements of *federal* law under an agreement that is mandated by *federal* law were not sufficient to establish the fundamentally *federal* nature of that determination for purposes of establishing federal jurisdiction under section 252(e)(6) of the Act, then the FCC's role in the statutory scheme provides conclusive proof of Congress' intent. As the text of section 252(e)(5) plainly states — and *Starpower* confirms — the state commissions and the FCC operate on precisely parallel tracks when they perform the federal regulatory functions required under the Act. While Congress intended the state commissions to be the first regulatory option, Congress plainly authorized the FCC to take the place of non-participating state commissions. Any suggestion that Congress intended federal judicial review of FCC determinations, but not state commission determinations, is foreclosed by the Act itself, which provides those bodies with identical regulatory roles. Indeed, as noted above, if any presumption is warranted, it is that Congress would have been more, not less, likely to require federal judicial review of state regulators implementing a federal regulatory scheme.

In short, it is undeniable that both state and federal regulators are wielding federal power in discharging their duties under the Act, and thus should be subject to review in federal courts in connection with disputes arising out of the performance of those duties. When the FCC answers an interpretation question concerning the federally-imposed obligations set forth in a federally-mandated interconnection agreement, that question unquestionably is federal in nature and reviewable in federal court. See *Starpower*, ¶¶ 6-9. When state regulators answer precisely the same question, they are acting

as "'deputized' federal regulators. *MCI*, 222 F.3d at 343. In exchange for this grant of regulatory power, Congress has required the states to agree to submit to federal jurisdiction to review their actions, just as the federal courts review parallel FCC rulings under section 252(e)(5). If this were not so, the federal courts could not fulfill their duty under the Act of "draw[ing] the lines to which" a state commission "must hew" and "bring[ing] to heel" any "state commission [that] is not regulating in accordance with federal policy." *AT&T Corp.*, 525 U.S. at 378 n.6.

C. Reading the decision below in light of the decisions of the other courts of appeals and the FCC, it is clear that the Seventh Circuit alone believes that Congress intended that the forum for judicial review of identical substantive determinations would depend upon whether the Congressionally-authorized decision makers are state or federal. In the nearly eighteen months since the Seventh Circuit issued its decision below, the FCC and every other court of appeals that has been presented with the same factual scenario has rejected the Seventh Circuit's bifurcated scheme of judicial review. And the only district court outside of the Seventh Circuit that has embraced the decision below — the Arkansas district court in *Connect* — was flatly reversed. This trend in the courts is not surprising, for the Seventh Circuit's construction of the Act's review scheme is contrary to the text, structure, and purposes of the Act. In implementing the Act's requirements across the country, incumbent and competing LECs have invested untold millions of dollars in the process of negotiating and arbitrating interconnection agreements. If, as the Seventh Circuit has held, the federal courts are powerless to interpret and enforce the terms of those agreements to limit the parties' obligations to what they agreed to do, the inefficiency of litigating every enforcement action in two jurisdictions may well render many agreements not worth the paper on which

they are written. Under the Seventh Circuit's formulation, a contract could say in neon lights that the parties' obligations are limited to those that are imposed by federal law, yet the state commission could ignore that clear language and impose altogether new obligations (*i.e.*, the state commission could misconstrue and misapply federal law with impunity) — and the federal courts would be powerless to "bring [the state commission] to heel." *AT&T Corp.*, 525 U.S. at 378 n.6.

In contrast to the unique, asymmetrical review scheme concocted by the Seventh Circuit in the decision below, the Eighth and Fifth Circuits and the FCC in *Starpower* have scrupulously adhered to this Court's admonition to interpret statutes "as a symmetrical and coherent regulatory scheme," and to "fit, if possible, all parts into an harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000). Those decisions establish that all regulatory determinations with respect to a section 252 interconnection agreement — including whether a state commission has interpreted the agreement in a way that disregards the express terms of those agreements — are reviewable in the federal courts. This court should grant certiorari to reverse the anomalous decision below, in which the panel erroneously concluded that a state commission determination concerning the rights and obligations of parties under a section 252 interconnection agreement is *not* reviewable in federal court, but instead must be brought in a separate action in state court.

III. THIS COURT'S RESOLUTION OF THE SPLIT IN THE CIRCUITS IS URGENTLY NEEDED BECAUSE THE QUESTION PRESENTED ARISES FREQUENTLY.

In view of the thousands of interconnection agreements nationwide, and the frequent disputes over the meaning of these agreements — and of the Act's requirements that these

agreements implement — the circuit split described above is worthy of this Court's attention. Ameritech alone is a party to well over 400 interconnection agreements that have been approved in its five-state region in the five years since Congress passed the 1996 Act. And in that time, the parties to interconnection agreements nationwide have filed over 450 federal lawsuits invoking jurisdiction under section 252(e)(6) of the Act. Moreover, as matters now stand, SBC's operating companies (which include Ameritech and Southwestern Bell) are subject to one scheme for judicial review of state commission interconnection agreement determinations in the Seventh Circuit and entirely different review schemes in the Fifth and Eighth Circuits.

Furthermore, in the Seventh Circuit, *all* LECs (including respondents) must follow the nonstatutory divided review scheme created by the court below, pursuant to which every challenge to a state commission's interpretation of a section 252 interconnection agreement spawns two lawsuits, one in federal court and the other in state court. Apart from the radical nature of such a scheme, it imposes substantial and wholly unnecessary litigation costs on the parties. More importantly, given the centrality of interconnection agreements to the entire statutory scheme, the absence of a uniform, rational, and comprehensive scheme for review of state commission decisions under the Act as a result of the Seventh Circuit's anomalous decision substantially undermines Congress' goal of establishing a "uniform federal policy." *Aegerter* v. *City of Delafield*, 174 F.3d 886, 887 (7th Cir. 1999). The approach followed by the other circuits and by the FCC accomplishes this goal without in any way discouraging the state commissions from performing their authorized functions under the Act. Ameritech respectfully requests that this Court grant certiorari to resolve the split in the circuits and to give much needed

clarification and guidance to the lower courts on the important issue of federal jurisdiction presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-3150, 98-3322, 98-4080

Illinois Bell Telephone Company d/b/a Ameritech Illinois,
Plaintiff-Appellant, Cross-Appellee,

v.

WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation,
Defendants-Appellees,

and

Dan Miller, Richard Kohlhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),
Defendants-Appellees, Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1925—David H. Coar, *Judge*

Argued May 10, 1999—Decided June 18, 1999

Before BAUER, KANNE, and EVANS, *Circuit Judges*.

EVANS, *Circuit Judge*.

Once we determine whether we have jurisdiction (and the scope of that jurisdiction) under the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, what we will have before us today is a rather narrow issue on the merits: whether a decision of the Illinois Commerce Commission regarding reciprocal compensation for telephone connections to Internet service providers violates federal law.

Until the 1990's, local phone service was monopolistic; in fact, many people viewed it as a natural monopoly. Regulation was left to the states. Now, technological advances have taken us far beyond the sort of telephone services parodied by Ernestine.[1] Today, we even have competition in local markets. Through the Telecommunications Act of 1996 Congress has opened the door to competing local exchange carriers and has inserted both the Federal Communications Commission (FCC) and the federal courts into the previously state-regulated monopoly. Just how far into the scheme does the federal presence reach? is the $64,000 question.

Illinois Bell Telephone Company, doing business as Ameritech Illinois (Ameritech) is the incumbent local exchange carrier in Chicago and most of the rest of Illinois. WorldCom Technologies, Inc., Teleport Communications Groups, Inc., MCI Telecommunications Corp., Inc. and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation have, under the Act, recently become competitors

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[1] Lily Tomlin's character on Rowan and Martin's 1960's TV show, Laugh-In, who with an officious tone and a lot of nasal snorting sat at her switchboard and asked, "Have I reached the party to whom I am speaking?"

with Ameritech for local telephone business. When a competitor builds its own local network it interconnects its facilities with Ameritech so that calls can be made between customers of the two networks. For example, when an Ameritech customer makes a call, the person or entity called may be the customer of another of the carriers; Ameritech bills its customer for the call as a local call. The same is true if a customer of a competing carrier calls an Ameritech customer. If this were all that happened, the carrier whose customer received the call would not be compensated for its part in the transaction. But the 1996 Act provides for "reciprocal compensation" for local calls and it requires companies to establish agreements for intercarrier compensation for the calls. If the call is a local call, then, under the Act in the first example, Ameritech would have to pay reciprocal compensation to the other carrier for "terminating" the call (in the lingo of the industry). In this way, both carriers get money. Ameritech and each of the other carriers have interconnection agreements as required by the Act, 47 U.S.C. §§ 252(b)(5) and 252(d).

Section 252(d) sets out the procedure by which interconnection agreements are to be reached. The carriers must first attempt to negotiate in good faith to reach voluntary agreements. At any time in the negotiations a party may ask a state commission to participate as a mediator. If no agreement is reached, the Act provides for compulsory arbitration of unresolved issues. Any party may petition a state commission to arbitrate the dispute. Furthermore, any agreement reached by negotiation or arbitration must be submitted to the state commission for approval. If a state commission fails to carry out its responsibilities, the FCC will preempt the state commission's jurisdiction and act for the state commission. A state commission's failure to approve or reject an agreement, however, is not a failure to act; rather, the agreement will be deemed approved.

The interconnection agreements between Ameritech and each of the other carriers in this case are nearly identical. They became effective in late 1996 and early 1997 and have been approved by the Illinois Commerce Commission (ICC). For a time, the parties routinely paid reciprocal compensation under the agreements.

Trouble arose, however, when Ameritech became concerned that it was paying out more in reciprocal compensation than it was collecting. On July 3, 1997, it sent a letter to the other carriers, claiming that the imbalance was due to their inclusion of calls involving Internet service providers (ISPs) in the requests for reciprocal compensation. Ameritech said that it would no longer pay compensation for calls to Internet service providers because those calls were not local calls. It seems that the other carriers may have been concentrating their marketing on ISPs. The agreements provided for compensation per minute of use, and calls to ISPs are, quite predictably, of long duration.

That is true because Internet service providers are companies which offer their customers connections to the Internet through the telephone network. ISPs are assigned a local telephone number and the telephone companies, including Ameritech, bill their customers for a local call when the customers call ISPs within the local calling area. However, the ultimate connection is usually to a website in a distant location, giving Ameritech a basis for claiming that the calls were not local calls subject to the reciprocal compensation agreements. For reasons we need not get into, Ameritech is not obligated to compensate the carrier of the ISP if the call is deemed to be long-distance, rather than local. In other words, at the present time if a call to an ISP is not subject to reciprocal compensation, the ISP's carrier is not compensated.

Not surprisingly, when Ameritech cut off payments the other carriers filed complaints with the ICC. On March 11,

1998, the ICC ruled in their favor, finding that the plain language of the agreements mandates reciprocal compensation; that there is no basis for treating these calls differently from other local calls. The ICC, in fact, called Ameritech's conduct anti-competitive.

Ameritech filed the present case in the District Court for the Northern District of Illinois, naming as defendants the competing carriers and the Commissioners of the ICC in their official capacity. Ameritech also filed a petition for review of the order in a state court. District Judge David H. Coar, to whom the federal case was assigned, reached a decision, as Ameritech says, "affirming the ICC Order" on July 21, 1998, and entered judgment in favor of the competing companies on August 4, 1998. In entering judgment under Rule 54(b) of the Federal Rules of Civil Procedure, Judge Coar stated:

> This Court has currently pending motions to dismiss the Illinois Commerce Commission [which, correctly labeled, would be a motion of the Commissioners] from this action. Because of the novelty and urgency of the issues presented on the merits of the action and because the Eleventh Amendment issues presented by the Commission's Motions to Dismiss were not related to the merits of the underlying claim, this Court directed the Commission to participate in briefing of the issues on the merits without prejudice to its rights to proceed on its Eleventh Amendment Motions.

On August 25 the motions of the Commissioners to dismiss the action were denied. Before August 25 Ameritech had filed an appeal of the July 21 decision; after the decision on the motions to dismiss, it filed a second notice of appeal naming all defendants; the Commissioners filed a cross- appeal. All three appeals were consolidated.

Appellate jurisdiction over the Commissioners is somewhat problematic in that no formal judgment was entered against them. However, it is clear that the Commissioners participated

in the litigation on the merits of this action. In entering judgment pursuant to Rule 54(b) on August 4, Judge Coar made it clear that his decision disposed of the merits of the case, but also allowed the Commissioners to continue with their claim that the federal court was a forum in which they did not belong, obviously an issue which should have preceded a decision on the merits. The decision on the motions to dismiss resolved that issue, making the decision on the merits binding on the Commissioners (a decision, of course, going in their favor). It is a situation in which "formal defects in the terminating order do not prevent appeal." *Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994). *See also Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978). Although we conclude that we have jurisdiction over the appeal as it involves the Commissioners, we are dismayed by this snag and, we might add, by the cursory manner in which Ameritech and the Commissioners treated the issue, despite our order to brief it.

We proceed to the merits. The issue as Ameritech presented it to us is whether the calls to Internet service providers are local calls, subject to reciprocal compensation, or long-distance calls, often interstate. That is the issue which was exhaustively briefed; that, in fact, is the easy issue. But that is not, and cannot be, the issue we decide.

The appeal of the Commissioners of the Illinois Commerce Commission will lead us, however circuitously, to the real issue before us. The Commissioners contend that the federal courts have no jurisdiction over them. Originally they contended that, among other things, sovereign immunity prevents federal courts from exercising jurisdiction over them in their official capacity because in their official capacity they are the Commission, a state entity, and the State of Illinois has not waived its sovereign immunity. That argument is no longer tenable following our recent decision in *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 F.3d 315 (7th Cir. 1999), in which we determined that the participation of the

Commission in the scheme set out in the Act is a waiver of the state's sovereign immunity.

Another of the Commissioners' contentions, however, is that the Act, which admittedly provides for some federal court review over some actions of state commissions, does not provide review in this instance. This is an attack on our subject matter jurisdiction. The Commissioners say that the scope of review under § 252(e) is limited to review of an "agreement"; nowhere, they say, is a "federal district court authorized to review an *order* of a state commission, the result of complaints filed with the state commission under state law . . . ."

Section 252(e)(6) says in part:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

The commissioners rely on the word "agreement" and ignore the word "determination" despite the fact that in an earlier order in this case—*Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, 157 F.3d 500, 501 (7th Cir. 1998)—we said flatly, "Decisions of state agencies implementing the 1996 Act are reviewable in federal district courts." In addition, although the present case arises in a slightly different context, our decision in *MCI* explains the nature of our jurisdiction. We noted that subsection 252(e)(6) provides for judicial review of "state commission actions," not simply review of "interconnection agreements" and that subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), shows that Congress contemplated suits against state defendants in federal court. It provides that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this

section." We concluded that this language meant that Congress envisioned suits reviewing "actions" by state commissions and that those suits were to be brought exclusively in the federal courts. In addition, we said that Congress intended that the "state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions." At 320.

Of course, the Commission itself is not a party to the action before us even though, in its briefing in this court, Ameritech said that it brought the action to "challenge the ICC Order." Similarly, in its complaint Ameritech said that it was filing the action pursuant to § 252(e)(6) to challenge determinations made by the Illinois Commerce Commission. Even though the Commission is not a named party, the Commissioners themselves acknowledge that, in their official capacity, they are the Commission. We have jurisdiction under § 252(e) to review the actions of the Commission and will proceed on that basis.

But what is the scope of review under § 252(e)? Writing for the Court in *AT&T v. Iowa Utilities Board*, 119 S. Ct. 721, 733 n.10 (1999), Justice Scalia indicated that the Act was broad federal occupation of territory once belonging to the states and that in turning some "federal policymaking . . . over to state administrative agencies," Congress set out a scheme which "is decidedly novel." He continued, "saying that the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well," or, as he put it elsewhere, it is a "surpassing strange" setup. At 730 n.6.

Our view of the scope of review, however, has already been set out in *MCI* in which we indicated that we would review a state commission's action for "compliance with the requirements of § 251 and § 252 of the Telecommunications Act . . . ." We also said that we would not review those actions for compliance with state law. 168 F.3d at 320. The issue

before us today, then, is whether the ICC, in determining that under the agreements the parties intended that calls to Internet service providers would be subject to reciprocal compensation, violated federal law.

We have long given deference to the pronouncements of the FCC. *See, e.g., FCC v. National Citizens Committee for Broad.*, 436 U.S. 775 (1978); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465 (1984). It also appears that none of the telephone companies involved in the present case dispute that deference is in order; in fact, not surprisingly in this instance, everyone thinks the FCC is on its side. That agency is in the process of calling for hearings on proposed rules and will presumably carry out its duty to resolve ambiguities in the statute. *Iowa Util. Bd.*, 119 S. Ct. at 738. But in the absence of a rule, the agency issued a declaratory ruling on February 26, 1999, on the issue of whether calls to Internet service providers are local calls. *See* Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (February 26, 1999). The ruling was issued after the briefing in this appeal and obviously after the agreements at issue here were drafted.

The FCC said

> that the communications at issue here do not terminate at the ISP's local server, as CLECs [competing local exchange carriers] and ISPs contend, but continue to the ultimate destination or destinations, specifically at an Internet website that is often located in another state.

Declaratory Ruling at 9 ¶ 12. The FCC declined to separate ISP-bound traffic into two components: an intrastate service going to the local ISP and a portion, more likely than not to be interstate, going from the ISP to the websites. The conclusion was that ISP traffic for "jurisdictional purposes [is] a continuous transmission from the end user to a distant Internet

site." At 11 ¶ 13. This is the part of the ruling which Ameritech likes.

But having determined its jurisdiction, the FCC went on to a discussion of regulation of the calls in the absence of a rule covering compensation for these calls. It is this part of the ruling that the other carriers prefer. Because there is no rule yet promulgated on this issue, the FCC said:

> We find no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism.

At 15 ¶ 21. So parties may

> voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their section 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.

At 15 ¶ 22. Even if ISP traffic is largely interstate, parties may have agreed to treat it as subject to reciprocal compensation or, in fact, a state commission may impose reciprocal compensation in arbitration proceedings:

> A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding—or a subsequent state commission decision that those obligations encompass ISP-bound traffic—does not conflict with any Commission rule regarding ISP-bound traffic. By the same token, in the absence of governing federal law, state commissions also are free not to require the payment of reciprocal compensation for this traffic and to adopt another compensation mechanism.

At 18 ¶ 26.

Now that the FCC has issued its ruling, and noting again that we defer to its reasonable interpretations of the Act, our task is to examine the ICC order, not to determine whether the ICC correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation.

The short answer is that it does not. The FCC could not have made clearer that in the absence of a rule, a state agency's interpretation of an agreement so as to require payment of reciprocal compensation does not necessarily violate federal law.

The agreements here provide:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the other carrier] that a Telephone Exchange Service Customer originates on Ameritech's or [the other carrier's] network for termination on the other Party's network.

All the contracts contain the following definition, " 'Reciprocal Compensation' is As Described in the Act." In the contracts with AT&T, Focal Communications Corporation, WorldCom Technologies, Inc., MCIMetro Access Transmission Services, another relevant definition is " 'Local Traffic' means a call the distance of which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation . . . ." The "Commission" referred to is the Illinois Commerce Commission. The contract with Teleport Communications Group provides that " 'Local Traffic' means local service area calls as defined by the Commission," which again is the ICC.

The ICC concluded that the agreements unambiguously provide that:

> reciprocal compensation is applicable to local traffic billable by Ameritech. Since Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls.

ICC order dated March 18, 1998, at 11.

Ameritech attacks this conclusion primarily by stating that the Act does not require reciprocal compensation; the agreements precisely track the Act (reciprocal compensation is "as described in the Act"); therefore the agreements cannot require reciprocal compensation for calls to ISPs.

The syllogism is an oversimplification. That the Act does not *require* reciprocal compensation for calls to ISPs is not to say that it *prohibits* it. The Act simply sets out the obligations of all local exchange carriers to provide for reciprocal compensation: "Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." § 251(b)(5). Then in § 252(d)(2) state commissions are instructed that terms and conditions for reciprocal compensation are not to be considered reasonable unless they provide "for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier" and that the costs be determined on the basis of a "reasonable approximation of the additional costs of terminating such calls." The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out.

The ICC's conclusion—that reciprocal compensation should apply to traffic Ameritech bills as local traffic—does not violate the Act or the FCC's interpretation of the Act. In fact, the Commission was doing what it is charged with doing in the Act and in the FCC ruling. It was determining what the parties intended under the agreements. The FCC sets out factors which the state commissions may consider in evaluating the parties' intentions, concluding that the factors are illustrative only and that state commissions, not the FCC, are the arbiters of what factors are relevant in the determination. At 15 ¶ 24.

Predictably, however, Ameritech questions the ICC's determination regarding the parties' intentions. Ameritech contends that the agreements were negotiated against a backdrop of a long-standing FCC policy that ISP traffic is not local traffic. But that contention is shaky. In fact, the FCC recognized that agreements negotiated prior to the February ruling, as the ones at issue here were, were negotiated in the "context of this Commission's longstanding policy of treating this traffic as local, and the conduct of the parties pursuant to those agreements." At 15 ¶ 24. Undeterred, Ameritech points to prior statements and actions of the FCC, which could be interpreted as at least hinting that such traffic may ultimately be considered interstate. One such factor is that ISPs have long had an exemption from paying access fees for their connections to distant websites. The argument is that there would be no need for an exemption were the calls not interstate. Ameritech also relies heavily on *In re GTE Telephone Operating Cos.*; *GTOC Tariff No. 1*; *GTOC Transmittal No. 1148*, CC Docket No. 98-79 (F.C.C. Oct. 30, 1998), and to a lesser degree on *In re Bell Atlantic, Tel. Cos.*; *Bell Atlantic Tariff No. 1*; *Bell Atlantic Transmittal No. 1076*, CC Docket Nos. 98-168 et al. (F.C.C. Nov. 30, 1998), for the proposition that Internet traffic terminates on the Internet, not at the local server. Consequently, Ameritech says, "Internet traffic is not subject to reciprocal compensation under the Agreements or federal law." It is only in a footnote in its brief filed December 23, 1998, that

Ameritech acknowledges another statement, in our view an important statement, made by the FCC. We quote from *GTE*:

> This Order does not consider or address issues regarding whether local exchange carriers are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs.

At 1-2 ¶ 2. Also, in *GTE*, the FCC announced its attention to issue a separate order on reciprocal compensation issues, a reference, of course, to the February ruling. Putting aside the obvious fact that both *GTE* and *Bell Atlantic* were issued after the agreements in this case and so are not relevant to what the parties had in mind at the time of the negotiations, it seems clear that the FCC would not agree with Ameritech that it has had a long-standing policy against treating calls to ISPs as local calls.

There is nothing in the FCC ruling on reciprocal compensation which would prohibit a call from being a local call for some, but not all, purposes. The ICC considered relevant factors in evaluating the agreements, including the situation at the time the agreements were negotiated. Other relevant factors are that Ameritech's customers do not pay toll charges for calls to their ISP; Ameritech bills the customer for a local call. Customers dial a local number. The calls are routed over local lines, not long-distance lines. Also quite telling from our point of view is that in the agreements, the parties specifically granted to the ICC the right to define local traffic for reciprocal compensation purposes.

The FCC could not have made clearer its willingness—at least until the time a rule is promulgated—to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact, the Act specifically provides state commissions with an important role

to play in the field of interconnection agreements. Additionally, the ICC is in the mainstream of thought on the issue. Not that the majority rules in these matters, but the commissions in well over half the states have made the same determination that the ICC made, including some interpretations made after the February ruling. In short, nothing in what the ICC said violates federal law in existence at this time. We affirm the decision of the district court affirming the order of the Illinois Commerce Commission.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 19, 1999

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 98-3150, 98-3322, 98-4080

Illinois Bell Telephone Company d/b/a Ameritech Illinois,
Plaintiff-Appellant, Cross-Appellee,

v.

WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc. and Focal Communications Corporation,
Defendants-Appellees,

and

Dan Miller, Richard Kohlhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1925—David H. Coar, *Judge.*

ORDER

The petitions for rehearing and rehearing en banc will be held in abeyance pending the decision on rehearing in *MCI Telecommunications Corp v. Illinois Commerce Commission*, No. 98-2127. Within 10 days after the panel releases its opinion on rehearing in *MCI*, the parties should file supplemental memoranda discussing the effect, if any, of *MCI* on this case.

The court amends its opinion by adding the following language at the end:

> Lest there be any misunderstanding about what this conclusion means, we add that any issues of state law remain open for determination in the proper forum. Section 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision "interpreting" an agreement contrary to its terms creates a different kind of problem—one under the law of contracts, and therefore one for which a state forum can supply a remedy.
>
> This allocation of authority has a potential to cause problems. Federal jurisdiction under § 252(e)(6) is exclusive when it exists. Thus every time a carrier complains about a state agency's action concerning an agreement, it must start in federal court (to find out whether there has been a violation of federal law) and then may move to state court if the first suit yields the answer "no." This system may not have much to recommend it, but, as the Supreme Court observed in *Iowa Utilities Board*, the 1996 Act has its share of glitches, and if this is another, then the legislature can provide a repair.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 9, 1999

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

Nos. 98-3150, 98-3322, 98-4080

Illinois Bell Telephone Company d/b/a Ameritech Illinois,
Plaintiff-Appellant, Cross-Appellee,

v.

WorldCom Technologies, Inc., as successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group, Inc., MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc. and Focal Communications Corporation,
Defendants-Appellees,

and

Dan Miller, Richard Kohlhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),
Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 98 C 1925—David H. Coar, *Judge.*

ORDER

Petitions for rehearing and petitions for rehearing en banc have been filed in this case. The decision on rehearing issued in *MCI Telecommunications Corp. v. Illinois Bell Telephone Co. & The Illinois Commerce Commission*, ___ F. 3d ___ (7th Cir. July 24, 2000), does not require that we make any changes to the opinion we issued on June 18, 1999. For this and other reasons, the petitions for rehearing are unanimously denied. No judge has requested a vote on the petitions for rehearing en banc.[1] Accordingly, those petitions are also denied.

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[1] Chief Judge Joel M. Flaum and Circuit Judges John L. Coffey and Ilana Diamond Rovner took no part in the consideration of these petitions for rehearing.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Illinois Bell Telephone Company d/b/a Ameritech Illinois,
Plaintiff,

v.

WorldCom Technologies, Inc. as a successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group Inc., MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation

and

Dan Miller, Richard Kolhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),
Defendants.

No. 98 C 1925.

[July 21, 1998]

Judge David H. Coar

MEMORANDUM OPINION AND ORDER

Plaintiff Illinois Bell Telephone Co. d/b/a/ Ameritech Illinois ("Ameritech") has filed the instant suit challenging the Illinois Commerce Commission's ("ICC" or "the Commission") determination that Internet calls are "local traffic" as defined by Interconnection Agreements between Ameritech and several of the defendants, and therefore subject to reciprocal compensation. Ameritech contends that the ICC's decision violates the Telecommunications Act of 1996. A hearing on the merits of the case was held by this court on June 25, 1998. As set forth in this Memorandum Opinion and Order, this court upholds the ICC's decision.

I. PROCEDURAL HISTORY

In 1996, plaintiff Ameritech entered into negotiations for separate Interconnection Agreements with five of the defendants in this case, Teleport Communications Group, Inc. ("TCG"), WorldCom Technologies, Inc. ("WorldCom"), MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc. ("MCI"), AT&T Communications of Illinois, Inc. ("AT&T"), and Focal Communications Corporation ("Focal") (collectively the "Carrier defendants"). (Compl.¶ 16.) In 1996 and 1997 each of the Agreements was approved by the Illinois Commerce Commission ("ICC" or "the Commission"). On September 8, 1997, one of the Carrier defendants, TCG, filed a complaint against Ameritech alleging that Ameritech had violated the terms of its Interconnection Agreement by refusing to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Internet Service Providers ("ISPs") on TCG's network. (Order at 2.) On October 9 and 10, 1997, WorldCom and MCI filed similar complaints against Ameritech, and the three cases were consolidated on November 4, 1997. (Order at 2.) Subsequently, petitions to intervene were granted as to Focal, AT&T, and others. (Order at 2.)

On March 11, 1998, the ICC entered an Order incorporating factual findings regarding the Carrier defendants' complaints and concluding that Ameritech had violated its Interconnection Agreements. On March 27, 1998, Ameritech filed the instant suit against the Carrier defendants and the Commissioner of the Illinois Commerce Commission ("the Commissioners") seeking review in federal court of the ICC's March 11 Order pursuant to Section 252(e)(6) of the Telecommunications Act of 1996 and 28 U.S.C. § 1331. Ameritech's five-count complaint alleges that the ICC's order is contrary to governing federal law.[1] As relief, Ameritech requests this court to declare that the term "local traffic" as used in the Agreements does not include Internet ISP calls, declare that the ISP calls are not subject to the payment of reciprocal compensation, and issue an injunction against the enforcement of the ICC's order.

Ameritech also filed a motion for stay of the ICC's order pending review. On May 1, 1998, this court issued a stay of the Order pending expedited review of the case on the merits. The defendant Commissioners have filed two motions to dismiss the plaintiff's complaint. Due to the expedited nature of this proceeding, the Commissioners' motions are not yet fully

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[1] Count I alleges that the Commission's interpretation of the Agreements is erroneous as a matter of law because, pursuant to the Agreement, the Internet ISP calls are switched exchange access service. (Compl.¶¶ 40-45.) Count II alleges that the ICC order is contrary to controlling FCC orders which hold that Internet ISP calls are exchange access traffic. (Compl.¶¶ 46-51.) Count III alleges that the ICC's order violates controlling federal law which assigns authority over interstate communications to the FCC. (Compl.¶¶ 52-56.) Count IV alleges that the ICC order violates sections 251(b)(5), 252(d)(2), and 251(g) of the 1996 Act. (Compl.¶¶ 57-62.) Finally, Count V alleges that the ICC order must be set aside under Illinois law. (Compl.¶¶ 63-4.) Not all of the counts alleged in the complaint were presented to this court in the final briefing on the merits.

briefed, and will therefore be reviewed in a subsequent decision of this court. At this court's suggestion, the instant Opinion and Order are without prejudice to the Commissioners' positions raised in the motions to dismiss.

II. BACKGROUND

A. THE TELECOMMUNICATIONS ACT OF 1996

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of Title 47 of the United States Code) (hereinafter "the Act" or "Telecommunications Act"), is intended to foster competition in local telephone service. The Act, which amends the Communications Act of 1934, works to open "all telecommunications markets through a pro-competitive, deregulatory national policy framework." *In Re Access Charge Reform Price Cap Performance Review for Local Exchange Carriers*, CC Dockets 96-262 et al., Third Report and Order, 11 F.C.C. Rcd. 21354, ¶ 2 (Dec. 24, 1996) (hereinafter "Third Report and Order"). *See generally MCI Telecommunications Corp. v. Bellsouth Telecommunications*, Nos. 97 C 2225, 97 C 4096, 97 C 0886, 97 C 8285, 1998 WL 146678, at *1-2 (N.D. Ill. March 31, 1998); *GTE South, Inc. v. Morrison, Jr.*, 957 F. Supp. 800, 801-02 (E.D. Va. 1997). The Act preempts state and local barriers to market entry and requires new entrants into local telecommunication markets to be provided with access to telephone networks and services on "rates, terms, and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251(c)(2)(D) (1998).

Under Sections 251 and 252 of the Act, incumbent Local Exchange Carriers ("LECs") and telecommunication carriers have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated by the Act. *See id.* §§ 251(c), 252. Section 252 provides that parties may enter into agreements either

voluntarily or through arbitration with a state public utility commission. If the parties are unable to reach an agreement voluntarily, either party may petition the state public utility commission for arbitration. *See id.* § 252(b)(1). A final interconnection agreement, whether negotiated or arbitrated, is reviewed by the state commission in order to determine whether it complies with the Act. *See id.* § 252(e)(1).

The Act further provides that any party that is "aggrieved" has the right to bring an action in federal court to challenge the terms of the interconnection agreement: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 250, of this title and this section." *Id.* § 252(e)(6). Courts have found that review by the federal courts under Section 252(e)(6) of the Act extends to "the various decisions made by [state commissions] throughout the arbitration period which later became part of the agreement . . ." *GTE South*, 957 F. Supp. at 804.

B. STANDARD OF REVIEW

The Telecommunications Act does not explicitly state the standard that federal district courts should apply when reviewing the decision of a state commission. The Supreme Court has held that in situations "where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed . . . consideration is to be confined to the administrative record and . . . no *de novo* proceeding may be held." *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, 83 S. Ct. 1409, 1413 (1963) (citations omitted). Accordingly, review in the instant case is limited to the administrative record. *See, e.g., U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, Slip Op. at 3 (W.D.Wash. Jan.7, 1998).

Courts that have examined the standard to be applied in appeals from state commissions have found that the language of Section 252(e)(6) clearly limits a court's jurisdiction to determining whether the agreement meets the requirements of federal law, in particular, the Telecommunications Act. *See, e.g., Southwestern Bell Tel. Co. v. Public Util. Comm'n*, No. 98 CA 043, Slip Op. at 9 (W.D. Tex. June 16, 1998) (*citing GTE Northwest, Inc. v. Hamilton*, 971 F. Supp. 1350, 1354 (D. Or. 1997)). District courts reviewing decisions of state commissions agree that the commissions' interpretations of federal law are reviewed *de novo*, while all other issues, including factual findings, are reviewed with substantial deference. *See, e.g., Southwestern Bell*, No. 98 CA 043 at 10-11; *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, No. C 97-222WD (W.D.Wash. Jan. 7, 1998); *GTE South*, 957 F. Supp. at 804; *U.S. West Communications, Inc., v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997); *AT&T Communications of California, Inc. v. Pacific Bell*, No. C 97-0080, 1998 WL 246652, at *3 (N.D. Cal. May 11, 1998). Courts have reasoned that such a standard furthers the goals of the Telecommunications Act because state commissions have "little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency." *Hix*, 986 F. Supp. at 17.

This court agrees with the reasoning of the above-cited district courts regarding the standard of review for actions brought under the Telecommunications Act. In this two-tiered system of review, the court must first address whether the state commission's action in reviewing the interconnection agreements was procedurally and substantively in compliance with the Act and its regulations. *See Southwestern Bell*, No. 98 CA 043 at 10. If the court finds that the decision is consistent with federal law, the court must next determine whether the decision was arbitrary, capricious, or not supported by substantial evidence. *Id.* at 10-11. "Generally, an agency decision will be considered arbitrary and capricious if the

agency had relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Hix*, 986 F. Supp. at 18 (*citing Friends of the Bow v. Thompson*, 124 F.3d 1210, 1215 (10th Cir. 1997)).

III. ANALYSIS

The case at bar is an issue of first impression for this court. Although one other district court, *Southwestern Bell Tel. Co. v. Public Util. Comm'n*, No. 98 CA 043, Slip Op. at 14-25 (W.D. Tex. June 16, 1998) (holding that calls to an ISP are "local traffic" and therefore eligible for reciprocal compensation),[2] and state commissions in 19 states, (Carrier Def.'s Ex. 6), have determined that LECs must provide reciprocal compensation for calls to the Internet, no federal court in the Seventh Circuit has yet to answer this question.

This case involves the arcane regulatory and contractual question of the appropriate compensation for LECs that terminate Internet traffic. Ameritech argues that such calls are properly classified as "interstate"[3] exchange access calls and

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[2] Another federal district court found, in reviewing an agreement approved by the Washington Utilities and Transportation Commission, that the state commission had not acted arbitrarily or capriciously in "deciding not to change the current treatment of ESP call termination from reciprocal compensation to special access fee." *U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD, Slip Op. at 8 (W.D. Wash. Jan. 6, 1998) ("ESPs" refers to "Enhanced Service Providers," which include Internet Service Providers.).

[3] The Federal Communications Commission has determined that interstate telecommunications occur "when the communication or

therefore no reciprocal compensation should apply. The Carrier defendants and the Commissioners argue that such calls are "local" and therefore require reciprocal compensation under the terms of the Interconnection Agreements. Some review of relevant terminology and technology is useful for understanding the issue at bar, in particular, the billing procedures for local and long distance calls, as well as the growing phenomenon of the Internet and Internet Service Providers.

A. RECIPROCAL COMPENSATION

Section 251(b)(5) of the Telecommunications Act provides that all LECs have a "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The corresponding regulations define "reciprocal" compensation as an "arrangement between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of local telecommunications traffic that originates on the network facilities of the other carrier." 47 C.F.R. § 51.701(e) (1998). The reciprocal compensation system functions in the following manner: a local caller pays charges to her LEC which originates the call. In turn, the originating carrier must compensate the terminating LEC for completing the call. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dockets 96-98 et al., First Report and Order, 11 F.C.C. Rcd. 15499, ¶ 1034 (Aug. 8, 1996) (hereinafter "*First Report and Order*").

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transmission originates in any state, territory, possession of the United States, or the District of Columbia and terminates in another state, territory, possession, or the District of Columbia." *In re Federal-State Joint Board on Universal Service*, FCC 98-67, Report to Congress, CC Docket No. 96-45, ¶ 112 (April 10, 1998).

Reciprocal compensation applies only to "local telecommunications traffic." 47 C.F.R. § 51.701(a) (1998). Local telecommunications traffic is defined as traffic that "originates and terminates within a local service area established by the state commission." *Id.* § 51.701(b)(1). Ameritech argues that Internet calls are not properly classified as "local" calls under the Interconnection Agreements at issue. Therefore, according to Ameritech, payment of reciprocal compensation is improper.

B. ACCESS CHARGES

"Access charges" are the fees that long distance carriers, known as interexchange carriers ("IXCs"), pay to LECs for connecting the end user to the long distance carrier. "Access charges were developed to address a situation in which three carriers--typically, the originating LEC, the IXC, and the terminating LEC--collaborate to complete a long-distance call." *First Report and Order* ¶ 1034. Typically, the long-distance carrier will pay both the terminating and originating LEC an access charge. The service provided by the LECs is known as "exchange access." The 1996 Act defines "exchange access" as "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." 47 U.S.C. § 153(16) (1998).[4]

C. THE INTERNET

"The Internet is an international network of interconnected computers . . . . [which] enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world. The Internet is a unique

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[4] "Telephone toll service" is defined by the act as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." 47 U.S.C. § 153(48) (1998).

and wholly new medium of worldwide human communication." *Reno v. American Civil Liberties Union*,--- U.S. ---, ---, 117 S. Ct. 2329, 2334 (1997) (footnote and internal citation omitted). The Internet functions by splitting up information into small chunks or "packets" that "are individually routed through the most efficient path to their destination . . ." *In re Federal-State Joint Board on Universal Service*, FCC 98-67, Report to Congress, CC Docket No. 96-45 (April 10, 1998) at ¶ 64 (hereinafter "*Universal Service Report*"). Despite the growing importance of the Internet in worldwide communications, "[t]he major components of the [Telecommunications Act] have nothing to do with the Internet." *Reno*, --- U.S. at ----, 117 S. Ct. at 2338.

D. INTERNET SERVICE PROVIDERS

An Internet Service Provider ("ISP") is an entity that provides its customers the ability to obtain on-line information through the Internet by communicating with web sites. ISPs function by combining "computer processing information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services." *Universal Service Report* ¶ 63. If an ISP is in a local calling area, the ISP customer dials a seven-digit number to access the ISP facility and is generally charged a flat fee for the ISP usage, in addition to the corresponding local fee rate for the call to the ISP.[5]

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[5] Typically, when an individual calls the Internet the call is routed to a "dial-in site," "a small physical location (a phone closet for instance) that contains the electronic equipment needed to accept modem calls and connect them to" the Internet. Haran Craig Rashes, *The Impact of the Telecommunication Competition and the Telecommunications Act of 1996 on Internet Service Providers*, 16 Temp. Envtl. L. & Tech. J. 49, 69 (1997) (internal citations and footnote omitted.) "Each Internet Service Provider may place anywhere from one or two to thousands of incoming lines and modems in the same location. An Internet Service Providers' equipment at local dial-in sites consists of banks or pools of modems

Among the services offered to many subscribers to the Internet are electronic mail, file transfers, Internet Relay Chat, and the ability to browse and publish on the World Wide Web. *See, e.g., American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D.Pa.1996), *aff'd, Reno v. American Civil Liberties Union*, --- U.S. ---, 117 S. Ct. 2329 (1997).

ISPs have been exempted from paying "access charges" to LECs for connecting them to the end user. *Third Report and Order* ¶ 288. In 1983, the FCC classified ISPs as "end users" rather than as "carriers" for purposes of the access charge rules. Id. As a result of this decision, ISPs purchase services from LECs "under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates." *Id.* ¶ 285. In a 1996 Order reviewing the 1983 "exemption" decision, the FCC "tentatively conclude[d] that the current pricing structure should not be changed so long as the existing access charge system remains in place." *Id.* ¶ 288.

E. TELECOMMUNICATIONS VS. INFORMATION SERVICES

The FCC has repeatedly made it clear that "telecommunications" and "information services" are "mutually exclusive" categories. *Universal Service Report* ¶ 59. *See also id.* ¶ 57 ("[W]e find strong support in the text and legislative history of the 1996 Act for the view that Congress intended 'telecommunications service' and 'information service' to refer to separate categories of services.") According to the FCC, such an interpretation is "the most faithful to both the 1996 Act and the policy goals of competition, deregulation, and universal service." *Id.* ¶ 59. The distinction drawn by the

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configured in multi-line hunt groups, with one lead number serving as a central number to receive calls." *Id.*

FCC mirrors the definitions of "telecommunications" and "information services" in the Act. "Information service" is defined by the Telecommunications Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20) (1998). "Telecommunications," however, is defined by the Act as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

Following the definitions in the Act, the FCC has found that the key distinction between telecommunications and information services rests on the functional nature of the end user offering. *Universal Service Report* ¶¶ 59, 86. "[I]f the user can receive nothing more than pure transmission, the service is telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." *Id.* ¶ 59.

Applying these definitions, the FCC has determined that Internet services are "information services" and not "telecommunications." *See, e.g., Universal Service Report* ¶ 66 ("Internet service providers themselves provide information services, not telecommunications .."); *Id.* ¶ 80 ("The provision of Internet access service . . . is appropriately classed as an 'information service.' "); *Id.* ¶ 81 ("Internet access provider[s] . . . are appropriately classified as information service providers.").

There may be some rare instances, however, when the services provided by the Internet are actually telecommunications. For example, the FCC indicated in its recent report that "phone-to-phone telephony"[6] lacks the characteristics of information services, and could actually be classified as telecommunications services. *Id.* ¶ 89. However, the FCC reserved making any final ruling on the subject until a more complete record is established. *See id.* ¶ 90. *See generally* Robert M. Frieden, *Dialing for Dollars: Should the FCC Regulate Internet Telephony?*, 23 Rutgers Computers & Tech. L. J. 47 (1997) (discussing the various policy issues that may arise from the development of Internet telephony).

F. THE INTERCONNECTION AGREEMENTS

At the heart of this dispute are the Interconnection Agreements which were entered into between Ameritech and the various Carrier defendants. All of the Agreements provide that "local traffic" which terminates on the "other Party's network" is eligible for reciprocal compensation. Specifically, the Agreements state that:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the Carrier defendant] which a Telephone Exchange Service

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[6] In phone-to-phone telephony, "the customer places a call over the public switched telephone network to a gateway, which returns a second dial tone, and the signaling information necessary to complete the call is conveyed to the gateway using standard in-band (i.e., DMTF) signals on an overdial basis. The customer's voice or fax signal is sent to the gateway in unprocessed form (that is, not compressed and packetized). The service provider compresses and packetizes the signal at the gateway, transmits it via IP to a gateway in a different local exchange, reverses the processing at the terminating gateway and sends the signal out over the public switched telephone network in analog, or uncompressed digital, unpacketized form." *Universal Service Report* ¶ 84, n. 177.

> Customer originates on Ameritech's or [the Carrier Defendant's] network for termination on the other Party's network.

(MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1.) The Agreements define "local traffic" as "local service area calls as defined by the Commission," (TCG § 1.43), or as:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; *provided* that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis in original). The Agreements further provide that "switched exchange access service" is not eligible for reciprocal compensation. (MFS § 5.8.3; TCG § 5.6.2; MCI § 4.7.2; AT&T § 4.7.2; Focal § 5.8.2). "Switched exchange access service" is defined in the Agreements as "the offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service," which includes "Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access services." (MFS § 1.56; TCG § 1.65; MCI sch. 1.2; AT&T sch. 1.2; Focal § 1.66.)

The parties do not contend that the Agreements specifically classify the Internet as either local traffic or exchange access service. Indeed, this court could not find an express reference to the Internet in the various Interconnection Agreements.

G. THE COMMISSION'S DECISION

The Commission's Order concludes that Ameritech Illinois must pay reciprocal compensation to the Carrier defendants with respect to calls placed by Ameritech Illinois customers through the Internet via ISPs who are customers of the Carrier defendants.[7] In its decision, the Commission first reviewed the procedural history of the case and the positions of the parties. (Order at 1-10.) The Commission then presents a four-page analysis of the relevant facts and law for reaching its decision that reciprocal compensation applies to Internet calls.

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[7] The Order states in the pertinent part:

> IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 14 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.
>
> IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extend Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.

(Order at 16.)

The Commission's first reason for its decision is based on the language of the Agreements themselves. The Interconnection Agreements state that reciprocal compensation applies "for transport and termination of Local Traffic *billable* by Ameritech [or the Carrier defendant] which a Telephone Exchange Service Customer originates on Ameritech's [or the Carrier Defendant's] network for termination on the other Party's line." (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) (emphasis added). According to the Commission, the "billable" language in the Agreements "unambiguously provide[s] that reciprocal compensation is applicable to local traffic billable by Ameritech." (Order at 11.) Reasoning that Ameritech charges end users local service charges when completing calls that terminate at a competitor's ISP customer, the Commission concluded that "the plain reading" of the billable language necessitates reciprocal compensation charges for ISP calls. (Order at 11.)

The second rationale employed by the Commission is again dependent on the language of the Agreements. Specifically, the Agreements provide that reciprocal compensation applies for calls *terminated* on the other party's line. (MFS § 5.8.1; TCG § 5.6.1; MCI § 4.7.1; AT&T § 5.7.1; Focal § 5.8.1) The Commission found that a call to an ISP *terminates* at the ISP before it is connected to the Internet. (Order at 11.) The Commission was persuaded by the Carrier defendants' definition of industry practice, in which call termination "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (Order at 11, citing WorldCom Ex. 1.0 at 7.) According to the Commission, "termination" in the context of the Agreements does not mean that the call ends. (Order at 11.) The Commission's view of termination of the call leads to the conclusion that such calls are correctly classified as local calls under the Agreements.

In the final part of the Commission's analysis, it rejected the argument made by Ameritech that a call's distance must be determined on an "end-to-end" basis, that is, from the end user to the web site. Such a reading would be an "outdated conception of the telecommunications network" and would be inconsistent with the Act and "the FCC's own decisions." (Order at 11-12.) In a rather confusing explanation of this point, the Commission states that Internet calls are unlike Feature Group A ("FGA") calls, which are classified in the Agreements as "switched access service." FGA calls are long distance calls that end users initiate by dialing a local seven-digit number. When the user dials the local number, she is connected to the interexchange carrier's toll switch which gives the user a second dial tone, at which point the user dials a long distance number. Although Ameritech argued that FGA calls are functionally identical to Internet ISP calls, the Commission found that such calls are distinguishable because FGA calls undeniably involve telecommunications traffic with the end user to which the call is terminated. In contrast, Internet calls involve what the FCC has found to be "information services" after the call is terminated to the ISP. "Based on these critical distinctions [between telecommunication traffic and information service] the FCC has determined that ISP traffic is *not* an exchange access service, but rather, ISPs should be treated as 'end users.'" (Order at 12.) (emphasis in the original).

H. FCC RULINGS

This court's role in reviewing the ICC's decision requires that it examine the court's interpretation of federal law de novo. *See* discussion, *supra*, Part II.B. Examining the FCC's interpretation of the relevant issue is therefore necessary because if this court finds that the FCC has a reasonable and consistently held interpretation of the applicable law, those rulings would be entitled to substantial deference. *Cf. Arkansas v. Oklahoma*, 503 U.S. 91, 110, 112 S. Ct. 1046, 1059 (1992); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,

Inc., 467 U.S. 837, 104 S. Ct. 2778 (1984). *See also Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 411 (7th Cir. 1987) ("An agency's construction of its own regulation binds a court in all but extraordinary cases."); *United States v. Baxter Healthcare Corp.*, 901 F.2d 1401, 1407 (7th Cir. 1990) (finding that a court must give great deference to agency's interpretations of its own regulations).

After reviewing relevant FCC precedent, this court finds that the FCC has not reached a coherent decision on the issue of the compensation of LECs providing Internet access. This result is due, in part, to the fact that the Internet, as a relatively new development to the telecommunications world, presents unique questions that have not previously been addressed by FCC decisions and policy. For example, the FCC recently initiated a Notice of Inquiry seeking comments on the effect of the Internet and other information services on the telephone network, noting that the Internet creates perplexing policy issues:

> [T]he development of the Internet and other information services raise many critical questions that go beyond the interstate access charge system that is the subject of this proceeding. Ultimately, these questions concern no less than the future of the public switched telephone network in a world of digitalization and growing importance of data technologies. Our existing rules have been designed for traditional circuit-switched voice networks, and thus may hinder the development of emerging packet-switched data networks. To avoid this result, we must identify what FCC policies would best facilitate the development of the high-bandwidth data networks of the future, while preserving efficient incentives for investment and innovation in the underlying voice network. In particular, better empirical data are needed before we can make informed judgments in this area.

Third Report and Order ¶ 311.

This court's determination that no clear rule on the issue exists is confirmed by the fact that on June 20, 1997, the FCC expedited consideration of a request for clarification of its rules from the Association for Local Telecommunications. The issue under review is identical to the issue at bar: whether LECs are entitled to reciprocal compensation pursuant to section 251(b) of the Telecommunications Act for transport and termination of traffic to LECs that are information service providers. *See Pleading Cycle Established for Comments on Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, Public Notice, FCC Common Carrier Bureau/CPD 97-30, 12 F.C.C. Rcd. 9715 (July 2, 1997). Thus, the precise issue under review in the instant case is currently being decided by the FCC. As of the date of this Memorandum Order and Opinion, the issue has not been resolved. *See also* Memorandum of the Federal Communications Commission as Amicus Curiae, Mem. at 2, June 29, 1998, *filed in Southwestern Bell*, No. 98 CA 043 (stating that the issue of the rights of LECs to receive reciprocal compensation is "pending before the FCC in an administrative proceeding and remains unresolved). Any ruling by the FCC on that issue will no doubt affect future dealings between the parties on the instant case.

The Carrier defendants and the Commissioners argue that reciprocal compensation applies only to telecommunications, and, therefore, the fact that ISPs generally do not provide telecommunications necessitates a finding that reciprocal compensation must be paid to the terminating LEC. Ameritech responds, however, that such argument is a red herring. Ameritech relies heavily on the FCC's statement in its 1998 *Universal Service Report* that the issue of reciprocal compensation does not "turn on" the telecommunications/information service distinction:

> We make no determination here on the question of whether competitive LECs that serve Internet service providers (or Internet service providers that have voluntarily become competitive LECs) are entitled to reciprocal compensation for terminating Internet traffic. That issue, which is now before the Commission, does not turn on the status of the Internet service provider as a telecommunications carrier or information service provider.

¶ 106, n. 220. Although the statement of the FCC in Footnote 220 is ambiguous as it relates to the issues involved here, this court agrees with Ameritech to the extent that any rationale regarding whether reciprocal compensation must be paid for such calls cannot hinge entirely on the information service/telecommunications distinction. This does not mean, however, that the distinction does not exist[8] (*see* discussion, *supra*, Part III.E) or that an understanding of the distinction is wholly irrelevant to a discussion of the issue at bar.

Despite the fact that Ameritech shuns the information service/telecommunications distinction, it nonetheless argues that language in the FCC's reports indicating that Internet information services are provided *via telecommunications* is relevant to their argument. *See Universal Service* ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.' "); *Id.* ¶ 3 (stating that the Internet "stimulates our country's use of telecommunications"; ISPs are "major users of telecommunications."); *Id.* ¶ 15 ("[W]e clarify that the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications.' "). Nonetheless, for the same reasons stated against the defendants' use of the distinction, this court finds

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[8] For example, at oral argument, counsel for the plaintiff clearly stated that it is "undisputed" that ISPs provide information services and are not providers of telecommunications. (Tr. at 31.)

that the fact that ISPs use telecommunications is not the determining factor in the instant case.

Ameritech's reliance on language in the *Universal Service Report* indicating that the telecommunications backbone to the Internet is "interstate telecommunications" is more persuasive authority for of the plaintiff's view. *See, e.g., Universal Service Report* ¶ 55 ("We conclude that entities providing pure transmission capacity to Internet access or backbone providers provide *interstate* '*telecommunications.*' Internet service providers themselves generally do not provide telecommunications.") (emphasis added); *Id.* ¶ 67 ("The provision of leased lines to Internet service providers, however, constitutes the provision of *interstate telecommunications*. Telecommunications carriers offering leased lines to Internet service providers must include the revenues derived from those lines in their universal contribution base.") (emphasis added).

Although the characterization of leasing lines to local ISPs as providing "interstate telecommunications" causes this court to pause, ultimately this court is not convinced that such language compels a finding under federal law that a call from an end user to an ISP is an interstate call and that termination for billing purposes does not occur at the ISP. This court is especially skeptical of the above cited language from the *Universal Service Report* because of the context in which the term "interstate" is discussed. A great deal of the *Universal Service Report* discusses the future of the FCC's goal of providing "universal service," that is, services to all customers throughout the country, "including low-income customers and those in rural, insular, and high cost areas . . . at rates that are reasonably comparable to rates charged for similar service in urban areas." 47 U.S.C. § 254(b)(3)(1998). Under the Telecommunications Act, carriers "that provide interstate telecommunications services must contribute to federal universal service mechanisms." *Universal Service Report* ¶ 55. A concern arises with the development of the Internet because,

as information service providers, ISPs do not contribute directly to the development of universal service. *Id.*

Given this background, this court is not convinced that the use of the term "interstate" in the context of discussing the Internet means that the FCC has made a determination that calls to the Internet are "interstate" for billing purposes. Nor is this court persuaded that such statements would require the overturning of a state commission's finding that such calls terminate locally at the ISP. Instead, the FCC has only provided that those who lease lines to ISPs provide interstate telecommunications and therefore ISPs are contributing, albeit indirectly, to the goal of universal service. *Id.* In essence, by leasing their lines from telecommunications carriers that do contribute to the universal system, the ISPs are contributing to the continuation of the goal of universal coverage. *See id.* ¶ 68 ("Internet access, like all information services, is provided 'via telecommunications.' To the extent that the telecommunications inputs underlying Internet services are subject to the universal service contribution mechanism, that provides an answer to the concern . . . [that] there will no longer be enough money to support the infrastructure needed to make universal access to voice or Internet communications possible.") (footnote and internal quotations omitted).

The FCC has made statements acknowledging that calls to the Internet using a seven-digit number are "local." *See, e.g., In re Access Charge Reform*, First Report and Order, 12 F.C.C. Rcd. 15982, ¶ 342, n. 502 ("To maximize the number of subscribers that can reach them through *a local call*, most ISPs have deployed points of presence.") (emphasis added). The FCC has also indicated that rate structures for such calls are appropriately addressed by state, rather than federal, regulators. *See id.* ¶ 345-46 ("ISPs do pay for their connections to incumbent LEC networks by purchasing services under state tariffs. Incumbent LECs also receive incremental revenue from Internet usage through higher demand for second lines by

consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services. To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators.") (emphasis added).[9]

Ameritech further argues, relying on decisions involving the creation of the access charge regime (*see* discussion, *supra*, Part III.B, III.D), that the FCC has ruled that Internet Calls are exchange access calls. For example, in 1983 the FCC stated that:

> Other users who employ exchange service for jurisdictionally interstate communications, including private firms, enhanced service providers, and sharers, who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . . Were we at the outset to impose full carrier usage charges on enhanced service providers and possibly sharers and a select few others who are currently paying local business

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[9] Ameritech states that most calls to ISPs are subject to flat (low) rate calls, and Internet calls tend to be longer than other types of calls. Under the current rate structure, Ameritech contends, if reciprocal charges are applicable to such charges Ameritech must pay more to the terminating LEC than it can bill its customers. Implicit in Ameritech's argument is the assertion that the reciprocal payments thus incurred far exceed the cost to the LEC for terminating the call. If that is true, it is unclear how the state regulators can adequately restore equity to the process except through some bifurcation which would assign a different reciprocal rate to ISP traffic. Merely raising the rates that the originating LEC charges its local customers would simply finance a windfall for the terminating LEC out of the pocketbooks of customers.

exchange service rates for their interstate access, these entities would experience huge increases in their costs of operation which could affect their viability.

MTS and WATS Market Structure, 97 F.C.C.2d 682, ¶ 78 (1983). Although the FCC has continued to uphold its ruling that ISPs are exempt from any access charges (*see, e.g., Universal Service Report* ¶ 146), the FCC has clarified its position in more recent rulings. In particular, the FCC has stated that due to "the evolution in ISP technologies and markets since we first established access charges in the early 1980s, it is not clear that ISPs use the public switched network in a manner analogous to IXCs. Commercial Internet access, for example, did not even exist when access charges were established." *In the Matter of Access Charge Reform*, First Report and Order, CC Docket Nos. 96-262 et al., FCC 97-158, ¶ 345 (May 16, 1997). Indeed, instead of classifying ISPs as IXCs, the FCC has maintained that ISPs are, and should remain, classified as end users. *Id.* ¶ 348. Furthermore, the FCC has concluded, at least "tentatively," that the current structure of charging ISPs as end users should "not be changed so long as the existing access charge system remains in place." *Third Report and Order* ¶ 288.

In conclusion, this court finds that at the time that the Agreements were entered into there was no clear FCC position on whether or not calls to Internet ISPs are interstate exchange access calls. The FCC is currently reviewing the very question at issue in this case. Accordingly, the answer to the question of the interpretation of the Agreements lies principally in contract interpretation. These are questions that this court must review with substantial deference to the ICC's findings.

I. FINAL ANALYSIS OF ICC DECISION

The ICC's decision states three reasons for rejecting Ameritech's argument. This court finds that the third reason, which is based principally on the information

services/telecommunications distinction, is not relevant to the case at bar. (*See* discussion, *supra*, Part III.H.) However, as the third reason does not include incorrect statements of federal law and this court finds that the remaining two reasons stated in the Commission's opinion are sufficient to uphold the decision, Ameritech's request that the decision be set aside is rejected.

The third section of the ICC's analysis is less clear than the other two arguments. Indeed, the third argument is jumbled and difficult to decipher. Without clearly linking its reasoning to its decision to uphold reciprocal compensation for Internet calls, the ICC states in one stream of reasoning (encompassing only one page of text) that: (1) end-to-end jurisdiction is "outdated"; (2) FGA calls are distinguishable from Internet calls; (3) the Internet provides "information services" and not "telecommunications"; and, (4) ISPs are not exchange access service, but rather "end users." (Order at 11-12.) In fact, this section of the Commission's opinion reads more like a selective review of FCC precedent than solid reasoning for supporting reciprocal compensation for Internet calls.

For the reasons already discussed, this court finds that these statements of the Commission, though overstated, are not expressly violative of existing federal law. However, to the extent that this portion of the Commission's decision relies heavily on the distinction between information service and telecommunications, this court rejects that analysis. The FCC has warned that this distinction, although it does exist, is not the answer to whether the LEC is entitled to reciprocal compensation for terminating Internet traffic. *See Universal Service Report* ¶ 106, n. 220. Nonetheless, the Commission's analysis does not "turn on" this distinction. Furthermore, as the decision stands on its own based on the first two rationales, this court does not find that the Commission's discussion of the

information service/telecommunications distinction provides a basis for reversal.[10]

Close analysis of the remaining two rationales reveals that such reasoning is consistent with federal law and is supported by substantial evidence. These two arguments are: (1) the Agreements use of the word "billable" requires reciprocal compensation for Internet traffic because Ameritech bills such calls as local; and, (2) the industry use of the word "terminates" requires a finding that the call to the ISP terminates at the ISP.

First, the "billable" rationale is a reasonable interpretation of the contracts. Ameritech argues that such a reading is wrong as a matter of law, contending that the Agreements define local traffic based not on billing treatment, but on points of origin and termination of the traffic. (Ameritech Resp. at 14.) Ameritech further informs that the billing practice for Internet calls is identical to the billing treatment of FGA calls, and therefore the Commission's holding would make FGA calls "local." Ameritech does not cite any cases to support this proposition. Furthermore, Ameritech ignores the fact that the Agreements specifically exclude FGA calls from the reciprocal compensation provision. No such explicit provision is found in

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[10] Ameritech also criticizes the ICC's use of the distinction with Feature Group A calls ("FGA"), which is mentioned in the ICC's highlighting of the information service/telecommunications distinction in the third portion of its analysis. Ameritech stresses the point that FGA calls are "functionally and technically" indistinguishable from an Internet call. (Ameritech Merits Brief at 10.) However, Ameritech does not cite a single statute or ruling in support of this view. Although it may be appealing to analogize the two types of calls as functionally similar, this court will not be swayed by such argument. As previously discussed, a special provision in the Interconnection Agreements explicitly excludes FGA calls from paying reciprocal compensation. No such exception is provided for Internet calls.

the Agreements regarding Internet calls. In fact, the Internet and ISPs are not even mentioned in the Agreements. No doubt the next time Interconnection Agreements are negotiated between the parties such a provision regarding the termination of Internet calls will be the subject of vigorous discussion. However, this court will not impose such a provision into the Agreements as written.

Although reasonable persons may differ on the interpretation of the language of the Agreements, a finding that calls that are billed as local must receive reciprocal compensation is not violative of current federal law. Furthermore, such a finding is a reasonable interpretation of the contracts and is neither arbitrary nor capricious. It is undeniable that Ameritech has consistently billed its customers for their calls to ISPs as local calls. This court therefore concurs with the ICC's conclusion that the Ameritech billing scheme warrants a finding that such calls are subject to reciprocal compensation.

Second, this court finds that the ICC's determination that calls to the ISP terminate at the ISP is not contrary to federal law and is supported by substantial evidence. Ameritech's argument that federal law requires that this court adopt a "jurisdictional" standard for termination that would be measured on an "end-to-end" basis is not convincing. Although Ameritech is correct that "end-to-end" language is used in some earlier FCC decisions in different contexts,[11] the FCC has not

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[11] *See, e.g., Southwestern Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68*, Order Designating Issues for Investigation, 3 F.C.C. Rcd. 2339, ¶ 28 (1988) (rejecting the view that two calls are created by the use of a 1-800 number for a credit card call and stating that "[s]witching at the credit card switch is an intermediate step in a single end-to-end communication."); *Petition for Emergency Relief and Declaratory Ruling Filed by the Bellsouth Corporation*, 7 F.C.C. Rcd. 1619, 1619-21 (1992) (finding that a call to an out-of-state voice mail service is a single interstate communication); *Long-Distance/USA, Inc.*, 10 F.C.C. Rcd. 1634, ¶

issued any rulings indicating that Internet calls must be measured on an end-to-end basis, with the ultimate web site qualifying as one "end." Furthermore, all of the cases cited by the plaintiff in support of its end-to-end argument are from the pre-1996 Act era. (*See* Ameritech Mem. at 17-18.)

Instead of classifying the web sites as the jurisdictional end of the communication, the FCC has specifically classified the ISP as an end user. *See, e.g., Third Report and Order* ¶ 288. Given the absence of an FCC ruling on the subject, this court finds it appropriate to defer to the ICC's finding of industry practice regarding call termination. Indeed, the Internet Agreements themselves authorize the Commission to determine when a call qualifies as "local."[12]

The ICC's decision included the following finding of fact regarding call termination:

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13 (1995) (finding that 1-800 calls are a single communication; "both court and Commission decisions have considered the end-to-end nature of the communication more significant than the facilities used to complete such communications").

[12] TCG's Agreement provides that "local traffic" is "local service area calls as defined by the Commission." (TCG § 1.43.) The Agreements of the other Carrier defendants provide that a "local call" is:

> a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise *determined by the FCC or Commission* for purposes of Reciprocal Compensation; provided that in no event shall a Local Traffic call be less than fifteen (15) miles as so calculated.

(MFS § 1.38; MCI § 1.2; AT&T § 1.2; Focal § 1.46.) (emphasis added).

> [W]e are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned . . ."

(Order at 11.) This definition of "termination"[13] is crucial to understanding the meaning of the Agreements, as the Agreements specifically use the word termination in defining reciprocal compensation. When a customer of a LEC dials the ISP's local, seven-digit number, the customer is connected to the ISP. Once this "call connection" is established between the caller and the telephone exchange service of the seven-digit number, the call is deemed "terminated" for purposes of the Agreements. The fact that the ISP then connects the user to the Internet, where the user may access unlimited web sites, does not alter the fact that the call has been "terminated" at the ISP for purposes of reciprocal compensation.

J. THE ICC ORDER VIOLATES SECTION 251(G) OF THE ACT

Ameritech's final argument is that the ICC's order violates Section 251(g) of the Telecommunications Act. Pursuant to Section 251(g),

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[13] The ICC's definition of "termination" closely follows that adopted by the ICC. *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, ¶ 1040 (Aug. 8, 1996) ("We define 'termination,' for purposes of section 251(b)(5) [the reciprocal compensation provision of the Telecommunications Act], as the switching of traffic that is subject to section 251(b)(5) at the terminating carrier's end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party's premises.").

> On or after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

According to Ameritech, because no court order, consent decree, regulation, order, or policy of the FCC provided for the payment of reciprocal compensation prior to February 7, 1996, reciprocal compensation cannot now apply. Ameritech states that reciprocal compensation could only apply if the FCC were to explicitly so require by regulation. Such an argument is circular, and escapes the logic of this opinion. Section 251(g) merely provides that local exchange carriers must provide services with the same "equal access and nondiscriminatory interconnection restrictions and obligations" as prior to the passage of the Telecommunications Act, until such restrictions or obligations are superseded. As this court has found that the FCC has no prior ruling that controls in the instant case, there is no ruling that could possibly be violated by ordering continued payments of reciprocal compensation by the plaintiff. Furthermore, as the defendants point out, Ameritech did indeed pay reciprocal compensation for local calls prior to the passage of the Act.

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, this court affirms the Commission's determination that Local Exchange Carriers are entitled to reciprocal compensation under the Interconnection Agreements for Internet calls. The stay of the Commission's order is continued for an additional thirty-five (35) days to allow the parties to appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Illinois Bell Telephone Company d/b/a Ameritech Illinois,
Plaintiff,

v.

WorldCom Technologies, Inc. as a successor in interest to MFS Intelenet of Illinois, Inc., Teleport Communications Group Inc., MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation

and

Dan Miller, Richard Kolhauser, Ruth Kretschmer, Karl McDermott, and Brent Bohlen, Commissioners of the Illinois Commerce Commission (in their official capacities and not as individuals),
Defendants.

No. 98 C 1925

[Aug. 25, 1998]

Judge David H. Coar

MEMORANDUM OPINION AND ORDER

Currently before the court is the defendant Commissioners' first and second motions to dismiss the complaint of Illinois Bell Telephone Company. For the reasons stated in this Memorandum Opinion and Order, the Commissioners' motions are DENIED.

I. PROCEDURAL BACKGROUND

Plaintiff Illinois Bell Telephone Co. d/b/a/ Ameritech Illinois ("Ameritech") filed the instant suit pursuant to Section 252(e)6) of the Telecommunications Act of 1996,[1] Pub.L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151, *et seq*) (the "Act" or the "Telecommunications Act"), 28 U.S.C. § 131, and 28 U.S.C. § 1367. The suit challenges a determination made by the Illinois Commerce Commission ("ICC" or "the Commission") regarding Interconnection Agreements between Ameritech and several of the defendants.

On May 18, 1998, the Commissioners of the ICC ("the Commissioners") filed a motion to dismiss arguing that this court lacks subject matter jurisdiction under 28 U.S.C. § 1331 and that this case is barred by the Eleventh Amendment. On May 20, 1998, this court ordered briefing on the Commissioners' motion to dismiss. Due to the expedited nature of this case, this court determined that it would rule on the defendant's motion to dismiss separately from the ruling on the merits. On June 12, 1998, the Commissioners filed a second motion to dismiss, arguing that Ameritech's complaint was barred by the doctrines of collateral estoppel and res judicata and that this court should abstain from hearing this case under the doctrines of *Burnford* and *Younger*.

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[1] For general background on the Telecommunications Act, see *MCI Telecommunications v. Illinois Bell Telephone Co.*, No. 97 C 2225 *et al.*, 1998 WL 156678, at *1-2 (N.D.Ill. March 31, 1998).

On July 23, 1998, this court issued a Memorandum Opinion and Order on the merits of the instant action, upholding the ICC's determination that Internet calls are "local traffic" as defined by the Interconnection Agreements. *See Illinois Bell Telephone Co. v. WorldCom Technologies, Inc.*, No. 98 C 1925, 1998 WL 419493 (N.D.Ill. July 23, 1998). This court's ruling was, however, without prejudice to the Commissioners' right to proceed on its motion to dismiss.

II. FACTS

Much of the background in the instant case is discussed in this court's earlier Opinion, so it is not necessary to review it in detail here. *See id.**1. In 1996 and 1997, the ICC approved Interconnection Agreements entered into between Ameritech and the defendant carriers[2] in the instant case. The Interconnection Agreements all contained reciprocal compensation provisions whereby Ameritech and the defendant carriers agreed to compensate each other for the transport and termination of local traffic. Ameritech believed that, under the Agreements, Internet traffic was not "local" and refused to pay reciprocal compensation for the transport and termination of Internet traffic. According to Ameritech, such calls are properly classified as long distance and therefore not subject to reciprocal compensation. The defendant carriers filed complaints with the ICC regarding this issue. On March 11, 1998 the ICC issued a ruling determining that Internet calls are local. Ameritech subsequently filed the instant case seeking review of the ICC's order.

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[2] Teleport Communications Group, Inc., WorldCom Technologies, Inc., MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., AT&T Communications of Illinois, Inc., and Focal Communications Corporation.

III. DISCUSSION

The defendant Commissioners' motions to dismiss raise four different arguments: (1) lack of subject matter jurisdiction; (2) Eleventh Amendment bar; (3) res judicata and collateral estoppel; and, (4) abstention. This court will analyze each argument in turn.

A. Subject Matter Jurisdiction

The Commissioners' first argument is that this court lacks subject matter jurisdiction to proceed. Specifically, the Commissioners state that neither Section 252(e)(6) nor 28 U.S.C. § 1331 authorizes this type of review in federal district court. The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends upon the purpose of the motion. *See Freiburger v. Emery Air Charter, Inc.*, 795 F.Supp. 253, 256 (N.D.Ill.1992); 5A Wright & Miller, *Federal Practice & Procedure*: *Civil.2d*, § 1363 at 456 (2d ed.1990). If, as in the instant case, the motion simply challenges the sufficiency of the allegations of subject matter jurisdiction, the court must accept as true all well-plead factual allegations and draw all reasonable inferences in favor of the plaintiff. *United Transp. Union v. Gateway Western Ry. Co.*, 78 F.3d 1208 (7th Cir.1996) (citing *Rueth v. U.S. E.P.A.*, 13 F.3d 227, 229 (7th Cir.1993)).

Ameritech asserts that subject matter jurisdiction is proper under Section 252(e)(6) of the Telecommunications Act. Section 252(e)(6) provides that:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6) (1998). The Commissioners first argue that ICC's order which is the subject of review in this case is not a "determination" within the meaning of Section 252(e)(6). Therefore, Ameritech cannot be "aggrieved" by a determination by the state commission and cannot bring an action under the Act. Second, the Commissioners contend that Section 252(e)(6) does not provide for federal court review of an order of a state commission involving the interpretation and enforcement of an Interconnection Agreement after the Agreement has been submitted to a state commission and approved. This court finds that neither argument has merit.

The Commissioners cite recent federal district court decisions in support of their position that the ICC has not made a reviewable "determination." However, this court finds that the cases relied on by the Commissioners do not support such a position. *See GTE South Inc. v. Morrison*, 957 F. Supp. 800 (E.D. Va.1997); *GTE North v. Glazer*, 989 F. Supp. 922 (N.D. Ohio 1997); *GTE North v. McCarty*, 978 F. Supp. 827 (N.D. Ind.1997); *GTE Northwest v. Hamilton*, 971 F. Supp. 1350 (D. Or.1997). In all of these district court decisions, the court found that subject matter jurisdiction was lacking due to the fact that the state commission had not yet approved or rejected an interconnection agreement by the parties. Therefore, the courts found that there was no "determination" that was ripe for review. *See, e.g., Morrison*, 97 F. Supp. at 804 ("The statute's structure and purpose would be thwarted if this Court's review commenced before the completion of the [state commission's] proceedings."). The instant case arises under a very different context. Here, Ameritech seeks review of a state commission decision interpreting and enforcing an already approved agreement. Therefore, the cases cited by the Commissioners are not controlling.

In a recent Eighth Circuit decision interpreting the Act, *Iowa Utilities Board v. Federal Communications Commission*, 120 F.3d 753, 804 n. 24 (8th Cir.1997), *cert. denied, AT&T*

Corp. v. Iowa Utilities Bd., 118 S. Ct. 879 (1998), the court found stated that "[w]e believe that the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." This court finds that such an interpretation of the Act is consistent with the goals and structure of the Act. To hold otherwise would be to allow the state commissions to make critical decisions interpreting federal laws and policies, which was not Congress' intent in passing a federal communications act. *See U.S. West Communications v. Hix*, 986 F. Supp. 13, 17 (D. Colo.1997) ("[S]tate commissions, while having experience in regulating local exchange carriers in intrastate matters, have little or no expertise in implementing federal laws and policies and do not have the nationwide perspective characteristic of a federal agency."). The Act specifically provides that federal courts have exclusive jurisdiction to review Interconnection Agreements and to ensure that those agreements meet federal requirements. *See MCI Telecommunications*, No. 97 C 2225 *et al.*, 1998 WL 156678 at *14 (finding that § 252(e)(6) provides for exclusive review of agreements in federal court); 47 U.S.C. § 252(e)(4) ("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section."). Allowing state court review of state commissions' rulings interpreting agreements would run afoul of Congress' intent. *See Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc.*, No. 5:98 CV 18, — F. Supp.2d —, —, 1998 WL 413749, at *4 (W.D. Mich. July 21, 1998) ("[C]onsideration of the statutory scheme demonstrates that permitting state court review of this type of Order would directly contravene the intent of Congress."). In conclusion, this court finds that the ICC's order interpreting the meaning of the reciprocal compensation provision of the Interconnection Agreements constitutes a "determination" under the meaning of the Act that is subject to review in federal court.[3]

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[3] As this court has found that subject matter jurisdiction is present

B. Eleventh Amendment

The Commissioners claim that Ameritech's suit is barred by the Eleventh Amendment. This court addressed the identical argument in a previous case brought under the Telecommunications Act. *See MCI Telecommunications v. Illinois Bell Telephone Co.*, No. 97 C 2225 *et al.*, 1998 WL 156678 (N.D.Ill. March 31, 1998). Perhaps by way of commentary on their view of the rationale of that decision, the Commissioners do not even so much as acknowledge it in their motion to dismiss. In their reply brief, it is clear that they intend the instant motion to serve as a motion to reconsider the earlier ruling. This court therefore refers the parties to its earlier decision, which discussed the issue of immunity at length and held that: (1) the state's voluntary participation in the regulatory scheme constituted waiver of Eleventh Amendment Immunity, *see id.* at *7-8, and, (2) the doctrine of *Ex parte Young* allows the suit against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief, *see id.* at *13. This court therefore denies the Commissioners' motion to dismiss on the basis of Eleventh Amendment immunity.

C. Res Judicata and Collateral Estoppel

In their second motion to dismiss, the Commissioners argue that Ameritech's suit is barred by the doctrines of res judicata and collateral estoppel. Res judicata is a judicial doctrine designed to ensure the finality of judicial decisions. *See Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior

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pursuant to 47 U.S.C. § 252(e)(6), it is not necessary to review the Commissioners' second argument that subject matter jurisdiction was not properly alleged pursuant to 28 U.S.C. § 1331.

action. *See Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981). There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and, (3) a final judgment on the merits. *See Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar. The Commissioners argues that the elements of claim preclusion are satisfied: the parties are the same, the actions are identical in substance, and the ICC's March 11, 1998 order constitutes a final judgment on the merits.

Under the doctrine of collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). A federal court applies state collateral estoppel principles in determining whether a state court judicial determination precludes relitigation of an issue. *See Studio Art Theatre v. City of Evansville*, 76 F.3d 128, 130 (7th Cir.), *cert. denied*, 117 S. Ct. 177 (1996). In determining the preclusive effect of a prior state court judgment, federal courts must look to state law and determine whether another state court would give preclusive effect to the prior proceeding. *Kunzelman v. Thompson*, 799 F.2d 1172, 1176 (7th Cir. 1986). A federal court must give the same preclusive effect to a state court ruling as would a court in the rendering state. *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 896 (1984). Under Illinois collateral estoppel principles, four elements must be met for collateral estoppel to apply: "(1) the issue sought to be precluded must be the same as that involved in the prior litigation, (2) the issue must have been actually litigated, (3) the determination of the issue must have been essential to the final judgment, and (4) the party against whom estoppel is invoked must be fully represented in the prior action." *La Preferida, Inc. v. Cerveceria Modelo, S.A. de C.V.*, 914 F.2d 900, 906 (7th

Cir.1990). The Commissioners contend that all four elements have been satisfied, and that there is "no question" that Ameritech raised and fully litigated before the ICC the issues now presented in its complaint.[4]

This court finds, however, that the doctrines of res judicata and collateral estoppel are inapplicable to the instant case. As previously stated, this court has exclusive jurisdiction to review determinations made by the ICC interpreting and enforcing interconnection agreements. *See supra* Part III.A. This decision is supported by the Eighth Circuit's recognition that "the enforcement decisions of state commissions would also be subject to federal district court review under subsection 252(e)(6)." *Iowa Utilities Board*, 120 F.3d at 904 n. 24. As an appeal from an administrative decision, this court has jurisdiction to review *de novo* the state commissions' interpretation of law. All other issues, including factual findings, are reviewed with substantial deference. *See Illinois Bell Telephone Co.*, No. 98 C 1925, 1998 WL 419493, at *2-3. The fact that Congress gave federal courts jurisdiction to review such decisions negates any argument that the state commission's determination must be given preclusive effect. To hold otherwise would controvert the purpose of the Act.

E. Abstention

Finally, the Commissioners argue that this court should abstain from exercising its jurisdiction under the *Burnford* and *Younger* abstention doctrines. "Federal courts have a 'virtually unflagging obligation to exercise the jurisdiction given them.' " *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15, 103 S. Ct. 927, 936, (1983) (quoting *Colorado River*

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[4] Counts I through IV of its complaint were decided before the ICC and therefore Ameritech is estopped from relitigating these claims. The Commissioners argue that Count V, a state law claim based on supplemental jurisdiction, would have to be dismissed as well.

Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244 (1976)). Notwithstanding this obligation, a court may abstain from exercising its jurisdiction in certain, narrowly construed circumstances. The Supreme Court has identified four categories of circumstances in which abstention may be appropriate. *See Colorado River*, 424 U.S. at 814-18, 96 S. Ct. at 1244-46.

1. *Burnford* Doctrine

Under what is commonly referred to as the "Burnford doctrine," where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *New Orleans Public Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361, 109 S. Ct. 2506, 2514 (1989) (quoting *Colorado River*, 424 U .S. at 814, 96 S. Ct. at 1245).

The Commissioners argue that both of the alternate *Burnford* rationales for abstention are satisfied. However, this court finds that neither *Burnford* rationale applies to the instant case. First, the Commissioners have not made any convincing showing that there are difficult questions of state law presented. In fact, Count V is the only count that is brought under state law. The remaining counts were brought under the Telecommunications Act, a *federal* law. Second, the Commissioners have not demonstrated that federal review would be disruptive of state policy. The instant case involves the discrete question of whether calls terminated at Internet Service Providers are local for purposes of the interconnection

agreements. The ICC's ruling on this issue was based entirely on the language of the Agreements themselves and federal law. *See Illinois Bell Telephone*, No. 98 C 1925, 1998 WL 419493, at *7-8. Therefore, no state policy that will be threatened by federal review.

2. *Younger* Doctrine

Under the *Younger* abstention doctrine, in the absence of extraordinary circumstances, a federal court will not exercise jurisdiction if such exercise would interfere with an ongoing state court criminal prosecution. *Younger v. Harris*, 401 U.S. 37, 46, 91 S. Ct. 746, 751 (1971). The *Younger* doctrine requires that a federal court exhibit "comity," that is, a "proper respect for state functions." *Id.* at 44, 91 S. Ct. at 750. Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore v. Sims*, 442 U.S. 415, 426, 99 S. Ct. 2371, 2379 (1979). Courts considering the application of the *Younger* doctrine should consider three factors "(1) the judicial or judicial in nature state proceedings must be on-going; (2) the proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state court proceeding to raise constitutional challenges." *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir.1996) (citing *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290, 295 (7th Cir.1994)). The Commissioners argue that all three factors are satisfied because (1) Ameritech's petition for review of the ICC's March 11, 1998 order is currently pending in the Third District Appellate Court; (2) the regulation of telecommunications carriers is an important state interest and matter of substantial public concern; and, (3) Ameritech has an adequate opportunity to raise any federal issues in the ongoing state proceedings.

This court finds that *Younger* abstention is applicable to the instant case because there is no available state remedy for review of the ICC's decision. As this court has explained, under

the Telecommunications Act, federal courts provide exclusive review for the decisions of state commissions. *See Michigan Bell*, — F. Supp.2d at —, 1998 WL 413749, at *8 (finding that abstention does not apply because federal courts have exclusive jurisdiction over plaintiffs' 252(e)(6) claim).

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion and Order, the Commissioners' first and second motions to dismiss are DENIED.

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Teleport Communications Group, Inc. vs. Illinois Bell Telephone Company Ameritech Illinois	:	
Complaint as to dispute over a contract definition.	:	**97-0404**
WorldCom Technologies, Inc. successor in interest to MFS Intelenet of Illinois, Inc. -vs- Illinois Bell Telephone Company d/b/a Ameritech Illinois	:	
Complaint as to Respondent's failure to pay Complainant reciprocal compensation for local calls which originate on Respondent's network and terminate on Complainant's network.	:	**97-0519**
MCI Telecommunications Corporation and MCIMetro Access Transmission Services, Inc., -vs- Illinois Bell Telephone Company, d/b/a Ameritech Illinois	:	**97-0525** **Consolidated**
Complaint as to Respondent's refusal to pay reciprocal compensation to Complainant for local traffic terminated by Complainant to its Internet service provider customers.	:	

ORDER

By the Commission:

I. INTRODUCTION

On September 8, 1997, Teleport Communications Group, Inc. ("TCG") filed a Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech" or "Ameritech Illinois"). In its Complaint, TCG alleged that Ameritech Illinois had violated the terms of its interconnection agreement with TCG as approved by the Commission's order in Docket 96-AA-002. Specifically, TCG complained that Ameritech Illinois had refused to pay TCG reciprocal compensation for local calls originated by end users on Ameritech Illinois' network and terminated to Information Service Providers ("ISPs") on TCG's network in violation of Section 5.6.1 of its interconnection agreement. TCG requested that the Commission issue an order finding: (1) that the term "Local Traffic" as used in the interconnection agreement with Ameritech Illinois includes local calls terminated to ISPs subscribing to local exchange service from TCG; (2) that all such traffic is subject to reciprocal compensation, in the same manner as all other local calls from an Ameritech Illinois local exchange customer to a TCG local exchange customer; (3) that Ameritech Illinois is obligated to pay TCG for all ISP traffic delivered to it, including traffic delivered before the filing of its Complaint for which Ameritech Illinois has refused payment, together with interest on all amounts owed and unpaid; and (4) that Ameritech Illinois be reprimanded for anticompetitive and unilateral withholding of monies owed to TCG.

On October 9 and 10, WorldCom Technologies, Inc. ("WorldCom") and MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. (collectively "MCI"), respectively, filed complaints against Ameritech Illinois alleging similar violations of their interconnection agreements and requesting relief similar to that which TCG

requested. WorldCom and MCI, respectively, filed motions to consolidate Dockets 97-0404, 97-0519, and 97-0525. On November 4, 1997, the Hearing Examiner, on his own motion, consolidated the three dockets.

Petitions to intervene were filed by AT&T Communications of Illinois, Inc. and Focal Communications Corporation of Illinois ("Focal") in Docket 97-0404. America Online, Inc. and Consolidated Communications, Inc. filed petitions to intervene in all three dockets. All petitions to intervene were granted by the Hearing Examiner.

Pursuant to notice as required by law and the rules of the Commission, a prehearing conference, status hearing and evidentiary hearing were held before the duly authorized Hearing Examiner in Chicago, Illinois on September 25, 1997, October 9, 1997 and November 21, 1997, respectively. At the evidentiary hearing on November 2, 1997, TCG presented the direct and rebuttal testimony of William Page Montgomery, founder and principal of Montgomery Consulting. WorldCom presented the direct and rebuttal testimony of Alex J. Harris, Vice President of Industry Affairs for WorldCom. MCI presented the direct and rebuttal testimony of Dennis L. Ricca, Senior Regulatory Analyst for Public Policy for the Northern Region of MCI. Staff presented the direct and rebuttal testimonies of M. Al Talbott and Jason P. Hendricks, Chief Telephone Engineer and Economic Analyst, respectively, in the Telecommunications Division of the Commission. Ameritech Illinois presented the direct and rebuttal testimony of Eric L. Panfil, Direct - Local Exchange Competition Issues, and the direct testimony of Suzanne J. Springsteen, a Director of Ameritech Information Industry Services. At the conclusion of the hearing the record was marked "Heard and Taken".

Initial briefs were filed by TCG, WorldCom, MCI, Focal, Staff and Ameritech Illinois. America OnLine, Inc. filed an initial brief in the form of a "position paper" which Ameritech

Illinois moved to strike in its Initial Brief. Reply briefs were filed by TCG, WorldCom, MCI, Staff, Ameritech Illinois and Focal Communications. Ameritech Illinois filed a Motion for Leave to Respond to MCI's reply brief and a Response to MCI's reply brief. Draft Orders were also filed on January 16, 1998.

A Hearing Examiner's Proposed Order was duly served on the parties.

II. POSITIONS OF THE PARTIES

Complainants - Competitive Local Exchange Carriers

TCG, WorldCom and MCI took essentially similar positions on the issues in this proceeding in their testimony. All three carriers (collectively "CLECs") take the position that this proceeding involves a violation of interconnection agreements over which this Commission has jurisdiction. The CLECs state that Ameritech has breached the interconnection agreements by failing to pay reciprocal compensation to the CLECs for local calls originated by end users on Ameritech's network and terminated to Information Service Providers ("ISPs") on the CLECs' networks. The CLECs state that the interconnection agreements clearly require the payment of reciprocal compensation for calls "billable" as local traffic. Because Ameritech bills its customers for calls to ISPs under its local traffic rates, those calls must be subject to the reciprocal compensation provisions of the interconnection agreements.

The CLECs argued that treating calls that terminate to ISPs as local calls is consistent with the manner in which Ameritech Illinois treats this traffic for rating, accounting, and billing purposes. For example, WorldCom witness Harris testified that "when an Ameritech Illinois telephone exchange service customer places a call to an ISP within the caller's local calling area, Ameritech Illinois rates and bills such customer for a local call pursuant to the terms of Ameritech's local tariffs."

(WorldCom Ex. 1.0, p. 6). Mr. Harris further stated that Ameritech Illinois treats this traffic and the associated revenue as local for purposes of jurisdictional separations and ARMIS reports. Second, they also argued that a call to an ISP terminates at the ISP before it is connected to the Internet and, therefore, the call is a local call. To support this argument, they contended that, when the call reaches the telephone exchange service purchased by the ISP and to which the called telephone number is assigned, the call is terminated. Third, they further argued that treating calls to ISPs as local calls is consistent with the definition of local traffic contained in the interconnection agreements that they have with Ameritech Illinois. Section 5.8.1 of the WorldCom MFS agreement, for example, provides that:

> "Reciprocal compensation applies for transport and termination of Local Traffic billable by Ameritech Illinois or MFS which a Telephone Exchange Service Customer originates on Ameritech's or MFS' network for termination on the other Party's network."

"Reciprocal Compensation" is defined in Section 1.51:

> "As described in the Act, and refers to the payment arrangements that recover costs incurred for the transport and termination of Telecommunications originating on one Party's network and terminating on the other Party's network."

"Local traffic" is defined in Section 1.38 of the Agreement as:

> "a call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX, or as otherwise determined by the FCC or Commission for purposes of Reciprocal Compensation; *provided*, that in no event shall

a Local Traffic call be less than fifteen (15) miles as so calculated." (WorldCom Ex. 1.0, pp. 12-13).

In addition, the interconnection agreement between TCG and Ameritech defines local traffic as "local service calls as defined by the Commission." TCG Ex. 7 at 5. Based on these sections the CLECs contend that the agreements' reciprocal compensation provisions apply to local traffic terminated to an ISP. Mr. Montgomery further contended that Ameritech Illinois knew early on that the CLECs intended to market to ISPs. Several of the CLECs also contended that Ameritech Illinois simply regretted its prior position supporting reciprocal compensation, rather than "bill and keep". Fourth, the CLECs argued that calls to ISPs are routed to them over local interconnection trunks and, therefore, that this traffic must be local traffic.

Finally, the CLECs noted that other state commissions and the FCC have determined that traffic terminating to an ISP is local, and that this Commission should reach the same conclusion in this proceeding. Mr. Montgomery states that "[u]nder the FCC rules, the ISPs are not carriers subject to the access charge rules." (TCG Ex. 10, p. 12). Mr. Montgomery further contended that what is sometimes referred to as the FCC's "exemption policy" was a misnomer and is not really an exemption policy, because the FCC had not classified the ISPs as IXCs. Mr. Montgomery also claimed that Ameritech had taken contradictory positions in other FCC dockets. Mr. Harris stated that "the FCC unambiguously characterized the connection from the end user to the ISPs as local traffic." (WorldCom Ex. 1.0, p. 17)

The CLECs further contend that Ameritech Illinois' refusal to pay reciprocal compensation has anticompetitive implications. Mr. Montgomery, for example, argued that Ameritech Illinois was taking this position because it had been "bested" in the market by the CLECs. (TCG Ex. 10.0, p. 19).

AMERITECH ILLINOIS

Ameritech Illinois took the position that ISP calls are not "local" traffic within the meaning of the interconnection agreement and, therefore, are not subject to reciprocal compensation obligations. Ameritech further stated that the issues raised by the CLECs had already been presented to the Federal Communications Commission ("FCC") for resolution, raised questions regarding the interpretation of the FCC's access charge exemption policy and must be decided in the first instance by the FCC.

Ameritech Illinois witness Springsteen testified that she became concerned in April 1997 because CLEC terminating minutes of use subject to reciprocal compensation were significantly higher than Ameritech Illinois'. She initiated a study to determine why the traffic imbalance exists and concluded that it was due to Internet ISP traffic. Ameritech initiated the contract dispute process in July, 1997, that led to this proceeding. She also disputed the CLECs' contentions that Ameritech Illinois knew that ISP traffic caused the imbalance much earlier than that.

Ameritech Illinois witness Panfil first described the FCC's history regarding the proper treatment of ISP traffic. As explained by Mr. Panfil, the current regulatory treatment of ISP traffic has its origins in decisions which the FCC made in 1993 when it created the carrier access charge regime in response to the pending divestiture of the Bell Operating Companies by AT&T. *MTS and WATS Market Structure*, 97 FCC 2d. 682 (1983) (*111983 FCC* Order"). In 1983, Mr. Panfil stated that there was no question that both IXCs and ISPs used the local exchange networks in precisely the same way to originate and terminate interstate calls. Although the FCC required all IXCs to begin paying access charges, for policy reasons the FCC exempted ISPs from such charges and permitted them to continue paying local exchange rates. 1983 *FCC* Order, §711.

He further explained that the FCC's policy decision stemmed from the fact that the information services industry was in its infancy and reflected a concern that application of access charges at 1983 levels would impose rate shock.

Mr. Panfil asserts that in 1987, the FCC recognized that ISPs were not paying enough to cover the costs of the exchange access facilities they used and proposed to terminate the exemption. *Amendments* of *Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Notice of Proposed Rulemaking* FCC Rcd 4305 (1987). After intense lobbying by the ISP industry, however, Mr. Panfil stated that the FCC reluctantly concluded that the time was not yet right to correct the disparity.

Ameritech acknowledged that, in its 1996 access charge reform order, the FCC once again declined to impose carrier access charges on ISPs. In *re Access Charge Reform*, CC Docket Nos. 96-262 et al., 11344-48 (released May 16, 1997). However, at the same time, the FCC instituted a new proceeding to address the implications of information services more broadly, with the intention of developing proposals that the FCC contended would be "sensitive to the complex economic, technical and legal questions raised in this area." *Notice of Inquiry, Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket 96-202 (released Dec. 24, 1996).

Mr. Panfil further explained that the FCC is currently addressing precisely the same issue raised by the CLECs in this case in a proceeding initiated by the ALTS. *In the Matter of Request by ALTS for Clarification of the Commission's Rules Regarding Reciprocal Compensation for Information Service Provider Traffic*, CCB/CBD 97-30 (11ALTS Docket"). ALTS has requested an expedited FCC ruling that "calls to an Information Service Provider made from within a local calling area must be treated as local calls by any and all LECs involved

in carrying those calls." Mr. Panfil stated that Ameritech and all of the Complainants have submitted pleadings in FCC Docket 97-30 which set forth their respective positions. Indeed, Ameritech noted in its Reply Brief that the ALTS request was premised on the FCC's "exclusive jurisdiction". The comment cycle at the FCC is complete, and according to Mr. Panfil, the FCC is expected to issue a ruling within the near future.

Ameritech Illinois also disputed the CLEC's substantive arguments relative to the nature of ISP traffic. First, Mr. Panfil stated that Ameritech Illinois treats calls terminated to ISPs as local calls for billing and rating purposes solely due to the FCC's access charge exemption for ISPs, and that the billing and rating of such calls does not determine whether the call is a local call under state jurisdiction. He further stated that ISP calls are, in fact, interstate calls within the jurisdiction of the FCC. With respect to separations and reporting procedures, Mr. Panfil maintained that these procedures will be reviewed once the FCC has issued its ruling in the ALTS proceeding. He also noted that FGA traffic — which is indisputably access traffic — was also treated initially as local for these purposes.

Mr. Panfil contended that Ameritech Illinois' interconnection agreements with the CLECs do not define ISP calls as local calls. Mr. Panfil argued that, although the FCC has exempted ISPs from paying access charges, it never has considered ISP traffic to be local traffic. In his view, had the FCC concluded that ISP traffic is local traffic, the FCC would not have had the authority to decide whether or not ISPs should be required to pay access charges. Therefore, such calls are exchange access and, therefore, are not subject to the reciprocal compensation provisions in the agreements.

Third, Mr. Panfil argued that, although the call termination definition used by WorldCom witness Mr. Harris is an accurate service definition, it is not an appropriate *jurisdictional*

definition. He testified that the information service provided by the Internet ISPs to the end user is always jurisdictionally interstate. He further compared calls terminated to ISPs to Interstate Feature Group A ("FGA") access service, whereby an IXC's toll switch is assigned a standard local telephone number within the caller's local calling area, and the end user is billed for a local call. When the call is connected to the IXC's toll switch, that switch gives the end user a second dial tone, and the end user then dials a long distance call. Mr. Panfil pointed out that, while local charges are assessed for the local portion of the call, and while the FGA *service* provided by the LEC terminates at the IXC's POP, the calls are not jurisdictionally local calls. Rather, they are *jurisdictionally* interstate or intrastate access service. He added that local charges are billed to the end user because there has been no feasible way to suppress them. Mr. Panfil also maintained that Ameritech Illinois' position in other FCC dockets were not inconsistent with its position in this docket, contrary to Mr. Montgomery's contentions.

Fourth, Mr. Panfil and Ms. Springsteen both stated that the fact that ISP traffic is routed over local interconnection trunks is irrelevant. They noted that interim number portability ("INP") traffic and FGA traffic are also routed over these trunks even though INP traffic and FGA traffic are considered to be exchange access traffic. Finally, Mr. Panfil stated that other state commissions' decisions regarding the nature of ISP traffic are irrelevant to this proceeding, and are wrong in any event.

Mr. Panfil further took the position that application of reciprocal compensation requirements to this traffic would have unwarranted financial results. He pointed out that, because of the FCC's access charge exemption policy, handling ISP traffic is a losing proposition for all LECs. That is because the local rate structure is not compensatory for calls with long holding times, as are typical of Internet calls. Mr. Panfil stated that, if

reciprocal compensation for Internet calls is required, what is already a losing proposition for the LEC becomes financially disastrous. In support, he provided data which showed the financial burden imposed on Ameritech Illinois by "typical" Internet traffic, with and without reciprocal compensation obligations. In its Initial Brief, Ameritech Illinois stated that such a result would be contrary to the Commission's policies established in its *Customers First* proceeding for reciprocal compensation, which stated that such arrangements should be equitable to both parties.

Mr. Panfil also denied the CLECs' allegations that Ameritech's position in this case is anticompetitive. Mr. Panfil explained that Ameritech did not object to the CLECs competing for ISP traffic. He explained that Ameritech only objects to "subsidizing" the CLECs' marketing efforts through intercarrier compensation arrangements that require it to pay more to the CLECs than it receives from the end user in the first instance. He further stated that Ameritech's position was not based on the mere fact that it is a net "payor" under these agreements. He stated that Ameritech took the risk that CLECs would target customers with high terminating traffic requirements; however, Ameritech Illinois had not assumed the risk that the CLECs would target ISP traffic which has unusually long holding times and demand reciprocal compensation for traffic which is not local traffic in any event.

In the event that this Commission decides to address the issues on their merits now and concludes that some form of compensation is required, Mr. Panfil proposed an interim solution. This solution would apply until either the FCC resolves this issue or an appropriate economic structure is created that allows all carriers to recover their costs. Under his plan, Ameritech Illinois and the CLECs would develop an estimate of the revenues that they currently receive for Internet ISP traffic. The companies could jointly determine what percentage of the switching and transport facilities used for

calls terminated to an ISP belong to each company. The percentage factor could then be used to allocate the revenue pool between the companies. This approach, Mr. Panfil stated, would produce equitable results and would avoid creating a situation where one competitor subsidizes another.

In its Initial Brief, Ameritech Illinois contended that the FCC has preemptive jurisdiction over the issues in this proceeding. Ameritech Illinois argued that the FCC has exclusive jurisdiction over interstate traffic and that the FCC must be permitted to clarify its access charge exemption relative to this traffic. It further contended that the doctrine of primary jurisdiction requires that the Commission defer this proceeding and await the FCC's decision before considering the complaints on their merits. Ameritech Illinois noted that the FCC is uniquely suited to interpret its own prior orders; that the ISP traffic issue is not unique to Illinois and requires a single, uniform resolution applicable to all states; that a deferral of action in this case would avoid the risk of inconsistent results between this Commission and the FCC; and that a premature decision here would adversely affect the FCC's performance of its regulatory responsibilities. Finally, Ameritech Illinois argued that principles of comity, non-interference among decision-making bodies and interests of administrative economy justified deferral of action by this Commission.

STAFF

Staff took the same position as the CLECs, *i.e.*, that calls terminated to an ISP are local calls subject to reciprocal compensation. Staff contended that distinguishing between end user calls terminated to ISPs and those terminated to other end users, for purposes of reciprocal compensation, would violate the terms of the interconnection agreements between Ameritech Illinois and the CLECs. Staff argued that, because the agreements provide that reciprocal compensation is applicable to "Local Traffic billable by Ameritech," and since Ameritech

Illinois currently charges its end users local service charges when completing calls that terminate at the CLECs' ISP customers, withholding reciprocal compensation on those calls would violate the terms of the interconnection agreements.

Staff also took the position that there was no technical basis upon which to distinguish between end user calls terminated to ISPs and those terminated to any other type of end users.

Finally, Staff argued that the FCC does not consider ISP traffic to be exchange access traffic. This is because the current FCC rules classify ISPs as "end users" and not as telecommunications carriers. Further, in its *Access Charge Reform Order*, Staff argued that the FCC had concluded that ISPs should remain classified as end users for purposes of the access charge system. (*Id.* at 1348). In its rebuttal testimony, Staff further contended that ISP traffic is not exchange access service. Staff argued that, when the originating end user makes an FGA call and that call is connected to the IXC's network, the originating end user uses the IXC's network to exchange telecommunications traffic with the end user to which the call is terminated. However, when an originating end user calls an ISP in order to use the Internet, the traffic exchanged after the call is terminated to the ISP is not considered to be telecommunications traffic by the FCC. Instead, it is considered to be an information service. Staff also noted that, although the interconnection agreements between Ameritech Illinois and the CLECs do not explicitly define local traffic to include ISP traffic, these agreements do not define local traffic to exclude ISP traffic.

Staff also contended that Mr. Panfill's FGA analogy was inapt, because FGA is exchange access service. Rejecting Mr. Panfill's distinction between service and jurisdictional definitions, Staff responded that the FCC treats ISPs and end users, and, therefore, an ISP call is a local call. Staff opined that a change in the FCC's exemption policy was unlikely.

Staff agreed, however, that the trunks on which ISP traffic travels do not necessarily impact jurisdiction. Staff also questioned whether the FCC has jurisdiction over ISP traffic at all.

With respect to Ameritech Illinois, interim solution, Staff recommended that it not be adopted because it is not consistent with the interconnection agreements. Staff further suggested that the solution to the financial problem identified by Ameritech would be to raise end user rates, a solution which it stated is outside the scope of this proceeding.

COMPLAINANT'S RESPONSE TO AMERITECH

All three carriers claimed that this was a simple contract dispute that could be resolved within the specific context of the interconnection agreements. TCG further argued that computer-based transactions are different from telephone services and that Mr. Panfil's FGA analysis was incorrect. WorldCom and MCI also contended that FGA was not a good analogy because it has different technical interfaces and/or was otherwise irrelevant. MCI claimed that Ameritech Illinois had not challenged the notion that ISP traffic was local traffic until last summer and that it should have been aware that MCI intended to market to this segment.

WorldCom, TCG and MCI also opposed Ameritech's interim compensation proposal. They argued that it was not consistent with the interconnection agreements. TCG further claimed that Internet traffic would be difficult to track and, therefore, that Ameritech Illinois' interim revenue pooling proposal would be difficult to implement.

COMMISSION ANALYSIS AND CONCLUSION

In the present consolidated cases, Complainants have asked this Commission to enforce certain provisions of the Commission-approved interconnection agreements between Ameritech Illinois and the individual complainants. This

Commission's jurisdiction under the Public Utilities Act and Section 252 of the Telecommunications Act of 1996 (the "Act") to interpret and enforce the terms of interconnection agreements is not disputed. *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997).

The language of the interconnection agreements define local traffic, define switched access and define reciprocal compensation. The interconnection agreements of MCI and WorldCom define "Local Traffic" as follows:

> [A] call which is fifteen (15) miles or less as calculated by using the V&H coordinates of the originating NXX and the V&H coordinates of the terminating NXX or as otherwise determined by the [Federal Communications Commission] or Commission for purposes of Reciprocal Compensation; *provided*, that in no event shall a Local Traffic call be more than fifteen (15) miles as so calculated.

WorldCom Ex. §1.38; MCI Ex. 3.0, Schedule 1.2, at 8. The interconnection agreement of TCG defines Local Traffic as "local service calls as defined by the Commission" TCG Ex. 7, at 5.

The interconnection agreements provide for reciprocal compensation between Ameritech and the CLECs as follows:

> Reciprocal Compensation applies for transport and termination of Local Traffic billable by Ameritech or [the CLECs] that a Telephone Exchange Service Customer originates on Ameritech's or [the CLECs] network for termination for termination on the other Party's network . . . .
>
> The Reciprocal Compensation arrangements set forth in this Agreement are not applicable to Switched Exchange Access Service. . .

WorldCom Ex. 4, §5.8.1, 5.8.3; TCG Ex. 7, ¶ 5.6, at 14; MCI Ex. 3, ¶ 4.7, at 16.

The interconnection agreements define Switched Exchange Access Service as follows:

> [T]he offering of transmission or switching services to Telecommunications Carriers for the purpose of the origination or termination of Telephone Toll Service. Switched Exchange Access Services include: Feature Group A, Feature Group B, Feature Group D, 800/888 access, and 900 access and their successors or similar Switched Exchange Access Services.

WorldCom Ex. 4.1; TCG Ex. 7, at 7; MCI Ex. 3, Sch. 1.2, at 12.

The agreements unambiguously provide that reciprocal compensation is applicable to local traffic billable by Ameritech. Since Ameritech Illinois currently charges end users local service charges when completing calls that terminate at the complainants' ISP customers, the plain reading of the interconnection agreements inevitably leads to the conclusion that reciprocal compensation charges should apply to those calls. The interconnection agreements do not distinguish between end user calls terminated to ISPs and those terminated to other end users, nor as Staff noted, is there any technical basis upon which to distinguish between end users.

There is no legal basis for treating ISP traffic differently than the traffic of any other similarly-situated end users for purposes of reciprocal compensation. Nothing in the Act exempts ISP traffic or otherwise incumbent LECs from their reciprocal compensation obligation with respect to local traffic. The Act imposes upon all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications" 47 U.S.C. 251(b)(5). We conclude that Ameritech Illinois, by discontinuing its reciprocal

compensation payments thereby violated, and is continuing to violate, its interconnection agreements, and its duty under the Act.

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, FCC rules, and industry practice- including the plain language of the interconnection agreements, fully support our conclusion. Contrary to Ameritech Illinois' contentions, ISP traffic is *not* exchange access. First, we are persuaded by Mr. Harris' explanation of industry practice with respect to call termination. He testified that call termination within the public switched network "occurs when a call connection is established between the caller and the telephone exchange service to which the dialed telephone number is assigned, and answer supervision is returned." (WorldCom Ex. 1.0 at 7). He further noted that "call termination" does not mean that the call ends. Rather, the call ends when one party to the call disconnects by hanging up.

Ameritech Illinois' conception that the "jurisdictional" basis for a call is determined by a determination of the ultimate end points of the call (such as the databases and web sites accessed by an internet user) and that therefore, the FCC has exclusive jurisdiction over the issue in this docket reflects not only an outdated conception of the telecommunications network, but from a legal standpoint is belied by the Act and the FCC's own decisions. As Staff cogently explained, when an originating end user makes a Feature Group A call and that call is connected to the interexchange carriers' network, there is no dispute that the originating end user uses the interexchange carrier's network to exchange telecommunications traffic with the end user to which the call is terminated. However, when an originating end user calls an ISP provider in order to use the internet, the traffic exchanged after the call is terminated to an ISP is not considered to be telecommunications traffic by the FCC. Instead it is considered to be an information service and that is true regardless of

whether the ISP retransmits information received over such calls to or from further interstate or international destinations.

The FCC has concluded that information services are not telecommunications services, and indeed, the Telecommunications Act draws clear distinctions between "telecommunications", "information service", and "exchange access."

As recently as May of 1997 the FCC indicated that it considers internet access as consisting of more than one element:

> When a subscriber obtains a connection to an internet service provider via voice grade access to the public switched network, that connection is a telecommunications service and is distinguishable from the Internet service provider's offering.
>
> *FCC Joint Board on Universal Service ¶ 789*

Based on these critical distinctions the FCC has determined that ISP traffic is *not* an exchange access service, but rather, ISPs should be treated as "end users."

With respect to Ameritech Illinois' argument that the FCC has exclusive jurisdiction over the question presented here, the FCC has noted that,

> "ISPs do pay for their connections to incumbent LEC networks by purchasing service under state tariffs... To the extent that some intrastate rate structures fail to compensate incumbent LECs adequately for providing service to customers with high volumes of incoming calls, incumbent LECs may address their concerns to state regulators."
>
> *FCC Access Charge Reform Order at ¶ 346*

If the FCC had concluded that calls to ISPs are interstate in nature and thus that the connections between incumbent LECs

and Internet ISPs were interstate in nature, like those between incumbent LECs and IXCs for purposes of interstate calls, it would have concluded that it has the authority to address those compensation issues. Accordingly, contrary to Ameritech Illinois' suggestions, there is no jurisdictional conflict here and this proceeding may be resolved as above, through a straightforward interpretation of contractual terms which is well within the parameters established by existing federal policy.

Ameritech is obligated by its interconnection agreements to pay reciprocal compensation when its customers call internet service providers served by a competing LEC. Nevertheless, the Commission acknowledges that a significant economic issue is raised when regulation permits two different rate structures to be associated with a single telephone call. The evidence in this case shows the incumbent LEC bills customers a single charge for local calls, while the new LEC terminating the call charges the incumbent LEC on a *minutes of use* basis.

Necessarily then, the incumbent LEC will not fully recover the cost of calls to ISP's which last a long time. In these cases, the incumbent LEC will not recover from end-users as much revenues as it incurs in reciprocal compensation charges paid to the terminating carrier.

The Commission, like the FCC, is aware that Ameritech Illinois may need to change its rate structure to correct the alleged underrecovery of providing local network services for connections to ISPs.

There is no dispute that the FCC is currently considering various issues regarding internet communications. However, the initiation of that proceeding provides an insufficient basis for deferring a decision here. It is possible that the FCC may reverse itself and institute some type of access charge or other compensation regime which would be applicable to carriers, or ISPs or other telecommunications end-users. It is also quite plausible that the FCC may conclude that the current situation,

so recently reaffirmed by the FCC, should remain undisturbed. The ultimate conclusion, as well as its timing can only be the subject of speculation. This Commission anticipates that if the FCC institutes a change in policy which impacts the interconnection agreements or any other aspect of state policy, the parties will bring that matter to the Commission's attention in an appropriate fashion.

Ameritech Illinois' proposed interim solution is unacceptable. As MCI witness Ricca points out, it is little more than an attempt to rewrite the interconnection agreement to institute meet-point billing for a particular subset of calls. Ameritech Illinois had every opportunity to present such a proposal in the arbitrations but did not do so.

Finally, we are compelled to comment on our concerns regarding the event giving rise to this complaint. A number of years ago this Commission approved Ameritech Illinois' proposal to adopt a residential untimed local calling rate as part of a comprehensive restructure of the company's rates. While the Commission is certainly aware that the telecommunications environment has changed significantly since then, and the popularity of the internet may have altered the cost assumptions prevalent at the time, we find that Ameritech Illinois' unilateral action of withholding reciprocal compensation payments is wholly inappropriate. By withholding those payments from its local exchange competitors, surely Ameritech Illinois recognizes that it has done nothing to meaningfully address the alleged underrecovery of costs which, if it exists at all, arises primarily from its own rate structure. For more than a year Ameritech Illinois paid reciprocal compensation treating calls to ISPs as local traffic. Rather than withholding payment, Ameritech Illinois could have, and should have, simply petitioned this Commission for a clarification of its obligations under the interconnection agreement.

Indeed, Ameritech Illinois' unilateral "remedy" is so ill-tailored to its perceived problem that it lends substantial credence to the complainants' allegations that Ameritech Illinois' conduct is intentionally anticompetitive. Ameritech Illinois' local exchange competitors are obligated by law to terminate calls made by Ameritech Illinois' customers, they incur costs in order to do so, and they are entitled to be compensated for the use of their equipment and facilities. Significantly, the competitive local exchange carriers can hardly be considered the cause of any additional unrecovered *network* costs which Ameritech Illinois believes arise from increased internet usage.

Even if the complainants have specifically targeted ISPs in their marketing efforts, that is no more objectionable than if a carrier chooses to target a telemarketing firm, a take-out restaurant or a high usage household. As Focal points out, the market for service to ISPs is a growth market both in terms of new ISP entrants into the market and the growing demand for service from new and existing ISPs. It is therefore a natural target for a new entrant. The record establishes that the complainants, are highly dependent upon reciprocal compensation payments to finance their operations. The evidence suggests that traffic to ISPs can represent in excess of 60% of the new entrants' reciprocal compensation billings to Ameritech Illinois. The withholding of the payments caused and continues to cause complainants serious harm and has resulted in an anticompetitive impact which is contrary to the public interest.

Ameritech Illinois correctly points out that the decisions of other state commissions are not binding, and indeed, we have made an independent evaluation of the evidence presented in this docket. Nevertheless, it is striking that over a dozen states have considered this issue, and without exception all the state commissions have determined that calls to ISP's should be classified as local calls for the purpose of assessing reciprocal

compensation. Such agreement among the states concerning a controversial issue is rare. Notably, Ameritech Illinois makes no attempt to distinguish these decisions on the basis of facts or law but merely asserts that the decisions are "wrong". We think that is unlikely, and we join our counterparts in those states which have held that calls to ISPs are local calls and are subject to reciprocal compensation. The complaint is granted.

The Commission, having considered the entire record herein and being fully advised in the premises hereof, is of the opinion and finds that:

(1) Illinois Bell Telephone Company d/b/a Ameritech Illinois, is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) Ameritech Illinois and the complainants herein have entered into interconnection agreements pursuant to the Telecommunications Act of 1996; those interconnection agreements have been duly approved by Order of this Commission;

(3) the Eighth Circuit Court of Appeals in *Iowa Utilities Bd. v. FCC*, 120 F3d 753, 804 (1997) found that state commissions "retain primary authority to enforce the substantive terms of the agreements made pursuant to section 251 and 252"

(4) the Commission has jurisdiction of the parties and the subject matter herein;

(5) the recital of facts and conclusions thereon set forth in the prefatory portion of this order are supported by the evidence of record and are hereby adopted as findings of fact and conclusions of law;

(6) Ameritech Illinois has violated its interconnection agreements with each of the complainants by failing to pay reciprocal compensation for calls which are within 15 miles and for traffic that is billable as local from its customers to Internet Service Providers that are the customers of the complainants;

(7) Ameritech Illinois should be required to pay each of the complainants all charges for reciprocal compensation for calls which are within 15 miles and for traffic that is billable as local from its customers to ISPs that are the customers of the complainants; similarly, each of the competitive local exchange carriers should be required to pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois;

(8) the interpretation of the interconnection agreements made in this order should be effective from the dates of those interconnection agreements; Ameritech Illinois should be required to pay each of the competitive local exchange carriers the amount of money that has been withheld by Ameritech Illinois since it stopped making payments for ISP traffic; such payments shall include interest at the statutory rate for all withheld payments;

(9) any outstanding pleadings or motions not previously disposed of should be disposed of in a manner consistent with the results herein;

(10) the Chief Clerk of the Commission should be directed to maintain all information identified as proprietary and data so designated in this proceeding in a manner which will not permit disclosure, dissemination, revelation or reproduction thereof without further order of the Commission.

IT IS THEREFORE ORDERED that the interpretation of the interconnection agreements made in this order shall be effective from the dates of those interconnection agreements and that Ameritech Illinois shall henceforth pay each of the complainants all charges for reciprocal compensation for all calls which are within 15 miles and for that traffic that is billable as local from its customers to ISPs that are the customers of the complainants. Similarly, each competitive local exchange carrier shall pay Ameritech Illinois for all charges for reciprocal compensation for traffic that is billable as local from its customers to the ISPs that are customers of Ameritech Illinois.

IT IS FURTHER ORDERED that within five business days of entry of this Order, Ameritech Illinois shall pay each of the competitive local exchange carriers all reciprocal compensation charges which have been withheld, with interest at the statutory rate. To the extent Ameritech Illinois billed the competitive local exchange carriers for reciprocal compensation and then later provided them with credits on their bills for ISP traffic, it shall resubmit bills to the competitive local exchange carriers for the credited amounts.

IT IS FURTHER ORDERED that the Chief Clerk of the Commission shall maintain all information identified as proprietary and data so designated in this proceeding in a manner which will not permit disclosure, dissemination, revelation or reproduction thereof without further Order of the Commission.

IT IS FURTHER ORDERED that any outstanding pleadings or motions which have not previously been disposed of shall be disposed of in a manner consistent with this Order.

IT IS FURTHER ORDERED that, subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill.Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By Order of the Commission this 11th day of March, 1998.

(SIGNED) DAN MILLER

Chairman

(S E A L)

U.S. CONST. ART. III, SEC. 2, CL. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

47 U.S.C. § 252

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange

carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to

the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any

marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure

to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the

submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission

may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

(2) (2)
Supreme Court
FILED
JAN 16 2001

Nos. 00-878 and 00-921

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

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Rule 29.6 STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services LLC state as follows:

WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc. (formerly known as MCI Telecommunications Corp.), and MCImetro Access Transmission Services LLC are all wholly owned subsidiaries, directly or indirectly, of WorldCom, Inc. WorldCom, Inc. is a Georgia corporation that is publicly traded on the NASDAQ National Market under the symbol WCOM. No publicly held company owns 10 percent or more of WorldCom, Inc. stock.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Focal Communications Corp. states as follows:

Focal Communications Corporation, through its operating subsidiaries, provides local exchange telecommunications services, including telecommunications services to Internet service providers. Focal Communications Corporation is a Delaware corporation that is publicly traded on the NASDAQ National Market under the symbol FCOM. No publicly held company owns 10 percent or more of the stock of Focal Communications Corporation. There are no subsidiaries or affiliates of Focal Communications Corporation that have issued equity or debt securities to the public.

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STATEMENT

Respondents WorldCom Technologies, Inc. ("WorldCom"), MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, Inc., and Focal Communications Corporation (collectively the "Carriers") submit this brief in opposition to the petitions for certiorari filed by the members of the Illinois Commerce Commission (referred to collectively with the Commission as "ICC") and Illinois Bell Telephone Company ("Ameritech"). Those petitions attack the same Seventh Circuit ruling from diametrically opposed points of view. As we show, the Seventh Circuit adopted a correct intermediate position that is not in conflict with any decision of any other circuit and does not warrant review by this Court.

1. Statutory Scheme

Ameritech filed this case in federal court seeking review of the ICC's order enforcing "interconnection agreements" that the Carriers and Ameritech had entered into as provided in the Telecommunications Act of 1996 (the "Act" or "1996 Act"). [1/] Such agreements are a key feature of the system set up by the 1996 Act to promote competition in the local telephone market by requiring each incumbent local telephone company, such as Ameritech, to interconnect and "share its network with competitors." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999); *see* 47 U.S.C. § 251(c)(2)(A). Under the Act, new entrants and incumbents first attempt to negotiate the terms of interconnection. *See* 47 U.S.C. § 252(a)(1). If they cannot

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[1] At the same time it filed in the district court, Ameritech also filed a parallel action in the Illinois Appellate Court. The Illinois Appellate Court stayed that action at Ameritech's request pending resolution of this case. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 3-98-0393, Order Granting Stay (Ill. App. Ct. June 17, 1998). The stay remains in effect.

agree, the governing state commission is authorized, but not required, to conduct an "arbitration" to resolve disputed issues. *Id.* § 252(b)(1). The results of the negotiation and arbitration process are memorialized in an interconnection agreement, which must be submitted for approval to the state commission. *Id.* § 252(e).

Although the Act supplies minimum requirements that govern arbitrated provisions, parties may negotiate terms "without regard" to them. *Id.* § 252(a)(1). When parties voluntarily agree to terms, a state commission may reject the agreement only if it is discriminatory or against the public interest, convenience, or necessity. *Id.* § 252(e)(2)(A); *see also AT&T Corp.*, 525 U.S. at 371-73.

Through this statutory scheme, Congress altered the balance between federal and state authority in the area of local telecommunications competition. The 1996 Act partially supplants the existing system of exclusive state regulation, and imposes a new set of federal standards and procedures governing interconnection between incumbent local companies and potential competitors. *See* 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with authority to implement the federal standards created by the Act. *Id.* at 377-84 & n.5; 47 U.S.C. § 201(b). But Congress also carved out a new, voluntary role for state commissions that choose to oversee interconnection agreements. If a state commission declines to participate, the FCC will assume that function. 47 U.S.C. § 252(e)(5).

Whether rendered by a state commission or the FCC, agency determinations regarding the terms of interconnection agreements are subject to review in federal court for compliance with the Act. If a state commission elects to

participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251 . . . and [252]." 47 U.S.C. § 252(e)(6). If the FCC has acted in lieu of a state commission, its determinations are reviewed by a federal court of appeals under the Hobbs Act. *Id.*; *see* 28 U.S.C. § 2342(1).

2. Nature of the Dispute

This case concerns "reciprocal compensation," which is the payment that a local carrier receives for completing a call for another local carrier. With local competition, customers of one local carrier will call customers of another. Carriers must therefore assist each other in delivering calls. When a customer of one carrier makes a local call to a customer of another, only the caller pays its carrier for the telephone services, leaving the other carrier uncompensated. The caller's local carrier therefore must compensate the other carrier whose facilities are used to complete the call. *See* 47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.701; Am. Pet. App. 3a.

The specific issue in this case is the proper treatment of calls by customers of the Carriers and Ameritech to other local customers operating as "Internet Service Providers" (ISPs). These calls are treated for purposes of billing customers like any other local call. Am. Pet. App. 4a. Ameritech and the Carriers also routinely charged each other reciprocal compensation for terminating ISP calls placed by each others' customers. *Id.* at 82a-83a. In July 1997, however, Ameritech announced that it was unilaterally stopping reciprocal compensation payments for calls to local ISPs, claiming for the first time that such calls are not "Local Traffic." *Id.* at 4a. In response, the Carriers asked the ICC to enforce the agreements

by requiring Ameritech to resume payments of reciprocal compensation for ISP calls. *Id.* at 4a-5a. The ICC held an evidentiary hearing on November 21, 1997. *Id.* at 65a. On March 11, 1998, the ICC ruled that the plain language of the agreements, industry custom and practice, and Ameritech's own conduct mandated payment of reciprocal compensation for calls to ISPs. *Id.* at 5a, 76a-83a.

3. District Court Proceedings

On March 27, 1998, Ameritech filed suit in the district court under section 252(e)(6) against the Carriers and the ICC challenging the ICC's determination. Ameritech alleged that the ICC's interpretation of the interconnection agreements violated federal law, arguing that the FCC had determined as a matter of federal law that calls to ISPs are not local. After briefing by the parties, the court rejected the ICC's arguments that the court lacked jurisdiction and that the ICC was immune from suit under the Eleventh Amendment. *Id.* at 52a. But the court ruled against Ameritech on the merits, holding that the ICC's interpretation of the agreements did not violate federal law. *Id.* at 49a, 50a.

4. The Seventh Circuit's Decision

Ameritech and the ICC appealed to the Seventh Circuit. The court of appeals rejected the ICC's immunity claim based on its prior decision in *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("*MCI-I*"), *modified on reh'g*, 222 F.3d 323 (7th Cir. 2000) ("*MCI-II*"), *petition for certiorari filed*, 69 U.S.L.W. 3297 (U.S. Oct. 23, 2000) (Nos. 00-653, 00-744). Am. Pet. App. 6a. Reviewing the text of section 252(e)(6), the court also rejected the ICC's jurisdictional argument and found that "Congress

envisioned suits reviewing 'actions' by state commissions" for compliance with sections 251 and 252 of the Act. *Id.* at 8a.

But the Seventh Circuit also determined that a federal court's scope of review under section 252(e)(6) is limited. Because the plain text of section 252(e)(6) confines review to the question of compliance with sections 251 and 252, the court held that a court's task under section 252(e)(6) is "to examine the [state commission's] order, not to determine whether the [commission] correctly applied principles of state contract law, but to see whether its decision violates federal law, as set out in the Act or in the FCC's interpretation." *Id.* at 11a. Thus, the Seventh Circuit explained, section 252(e)(6) provided no basis for the court to "review [the ICC's] actions for compliance with state law." *Id.* at 8a. Accordingly, the Seventh Circuit found that Ameritech's appeal presented a "narrow issue on the merits: whether a decision of the [ICC] regarding reciprocal compensation for telephone connections to [ISPs] violates federal law." *Id.* at 2a. Reviewing the Act and the relevant FCC precedent, the Seventh Circuit concluded that "nothing in what the ICC said violates federal law in existence at this time." *Id.* at 15a.

Both Ameritech and the ICC filed rehearing petitions, raising essentially the same issues they raise here. In an initial response to Ameritech's petition, the Seventh Circuit amended its decision on August 18, 1999. It added language stating that "[s]ection 252(e)(6) authorizes a federal court to determine whether the agency's decision departs from federal law. A decision 'interpreting' an agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Id.* at 17a.

The rehearing petitions were held in abeyance for about a year, pending the Seventh Circuit's reconsideration of its Eleventh Amendment ruling in *MCI-I*. The Seventh Circuit ultimately issued a revised opinion in *MCI-II* reaffirming its ruling that state commissions do not have Eleventh Amendment immunity in actions brought under section 252 of the Act. It then denied the rehearing petitions in the instant case on August 9, 2000. *Id.* at 18a-19a.

REASONS FOR DENYING THE PETITIONS

The issues raised by the petitioners do not warrant this Court's review for three reasons.

First, there is no genuine division among the circuits as to any of the issues raised by the petitioners. Four circuits (the Fifth, Seventh, Eighth, and Tenth) have all held that a federal court does have jurisdiction under section 252(e)(6) to consider whether a state commission violated federal law in a ruling *enforcing* a previously approved interconnection agreement. At least three (the Fifth, Seventh, and Tenth) have agreed that a claim like Ameritech's in this case – that a state commission's enforcement order was based on a misinterpretation of the language of an interconnection agreement – raises issues of *state* law. Contrary to Ameritech's argument, no other circuit disagrees. Finally, as to the Eleventh Amendment issue raised by the ICC, all three circuits to have addressed the issue (the Sixth, Seventh, and Tenth) have held that state commissions are not immune from federal lawsuits brought under section 252(e)(6) claiming that the state commission violated federal law.

Second, even if there were "disarray" in the decisions of the circuits in this area, it would still make sense to defer

addressing the issues raised by the petitions. Those same issues are presented in cases currently pending in the Fourth, Sixth, and Eleventh Circuits. At the same time, relevant issues concerning reciprocal compensation for calls to ISPs are reportedly the subject of impending federal agency and potential legislative action, either of which could substantially limit the precedential value of any decision this Court might issue. There is no compelling reason for this Court to grant certiorari now when these issues are still making their way through all three branches of government. Ameritech will suffer no prejudice from having to pursue its existing contract claim in state court.

Third, the Seventh Circuit correctly resolved each of the issues raised by petitioners. There is no reason to think that Congress gave the federal courts *exclusive* jurisdiction over cases challenging state commission decisions to approve or reject interconnection agreements, *see* 47 U.S.C. § 252(e)(4), but denied the same courts the authority to review state commission enforcement actions for compliance with federal law. On the other hand, the Seventh Circuit appropriately recognized that a challenge to a state commission's interpretation of the language of an interconnection agreement raises issues of state law. Indeed, this Court's decision in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 22-23 (1982), compels that conclusion. Finally, the Seventh Circuit broke no new ground in applying the doctrines of waiver and *Ex parte Young* to preclude the ICC from invoking Eleventh Amendment immunity as to the purely federal claims Ameritech raised, and the Seventh Circuit resolved.

I. There Is No Genuine Circuit Split on Any of the Issues the Petitioners Raise.

A. The circuits agree that section 252(e)(6) applies to review of "enforcement decisions."

The ICC asserts that this Court's review is necessary to correct the Seventh Circuit's purportedly incorrect conclusion that section 252(e)(6) of the 1996 Act extends to review of state commission decisions interpreting or enforcing interconnection agreements. ICC Pet. at 12-18. The ICC argues that section 252(e)(6) only confers federal jurisdiction to review state commission determinations approving or rejecting interconnection agreements. *Id.*

No circuit split exists on this issue. Three other circuits have considered this very issue in practically identical cases and have agreed with the Seventh Circuit's conclusion that section 252(e)(6) confers jurisdiction to review state commission determinations in the "enforcement" stage as well as the "approval" stage. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Oklahoma, Inc.*, No. 99-5222, ___ F.3d ___, 2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000); *Southwestern Bell Tel. Co. v. Pub. Utils. Comm'n of Tex.*, 208 F.3d 475, 480 (5th Cir. 2000). No circuit has ruled to the contrary.

B. The circuits agree that interpretation of an interconnection agreement is primarily a question of state law.

Taking a view directly opposite that of the ICC, Ameritech contends that *all* questions relating to the interpretation and enforcement of an interconnection agreement are federal

questions cognizable in federal court pursuant to section 252(e)(6). But here again there is no circuit split on this issue. Ameritech's fundamental claim is that federal law governs all aspects of the question of "[w]hether a . . . state commission determination concerning the rights and obligations of the parties to a section 252 agreement deviated from the plain terms of the agreement." Am. Pet. at i. In addition to the Seventh Circuit, both the Tenth and the Fifth Circuits have rejected that argument in nearly identical cases. *Brooks Fiber*, 2000 WL 1827576, at *4; *Southwestern Bell*, 208 F.3d at 485; *see also Puerto Rico Tel. Co. v. Telecommunications Regulatory Board of Puerto Rico*, 189 F.3d 13 (1st Cir. 1999). No circuit has ruled otherwise.

Ameritech attempts to establish a circuit split by pointing to a different aspect of the Fifth Circuit's ruling – its authorization of federal court review of *state* law claims. Am. Pet. at 13, 17-19.[2] But even if that purported circuit split existed, it would have no relevance to this case, where Ameritech has consistently argued that it can pursue its claim of misinterpretation of the agreement in federal court because it is a *federal* claim. The Fifth Circuit itself expressly *rejected* that argument. *Southwestern Bell*, 208 F.3d at 484.

Nor is there a genuine conflict among the circuits even as to the question whether a federal court can entertain state law

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[2] The Fifth Circuit mistakenly read two cases, *US West Communications, Inc. v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9th Cir. 1999), and *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999), to support its conclusion that federal courts may review questions of state law. In fact, neither case considered any issue of state law, but held only that federal courts should consider questions of federal law de novo and factual determinations under an arbitrary and capricious standard. *US West*, 193 F.3d at 1117; *GTE South*, 199 F.3d at 745.

challenges to a commission's order enforcing an interconnection agreement. As the Tenth Circuit recently explained, the Fifth Circuit is properly understood as having endorsed the exercise of supplemental jurisdiction under 28 U.S.C. § 1367 to reach the state law claims. *Brooks Fiber*, 2000 WL 1827576, at * 4 (citing *Southwestern Bell*, 208 F.3d at 482). The Tenth Circuit itself took the same approach. *Id.* Nothing in the Seventh Circuit's decision in this case would preclude reliance on supplemental jurisdiction to reach state law claims in appropriate cases.

To the contrary, while the Seventh Circuit did seem to contemplate that in the usual case federal issues would be litigated in federal court and state issues would be litigated in state court, Am. Pet. App. 17a, it did not discuss supplemental jurisdiction. Nor was there any reason to do so, since Ameritech never invoked the court's supplemental jurisdiction – insisting instead that it was presenting only federal claims cognizable under section 252(e)(6).

Moreover, the Seventh Circuit's conception of how review would usually proceed was obviously influenced by a factor not present in the Fifth and Tenth Circuit cases – an assertion of Eleventh Amendment immunity by the defendant state commission. While state commissions do not have Eleventh Amendment immunity from federal claims brought under section 252(e)(6), *see* pp. 24-29 *infra*, they still may invoke Eleventh Amendment immunity as to state law claims. As to the latter, the *Ex parte Young* doctrine does not apply, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), and the argument for a finding of waiver of

immunity is also much more problematic.[3] Given these realities, in a case where a state chooses to assert its immunity, it is very likely that state claims will have to be brought in state court, as the Seventh Circuit noted. But the Seventh Circuit's acceptance of this forced bifurcation of the case does not conflict with anything in the Fifth or Tenth Circuit decisions. Nor should it be a surprise to this Court, which recognized in *Pennhurst* that bifurcation of a case involving both state and federal issues may be a necessary consequence of the Eleventh Amendment. *Id.* at 121-23.

In another attempt to manufacture a circuit conflict, Ameritech contends that the Eighth and Fourth Circuits and the FCC also have reached conclusions that diverge from the Seventh Circuit's analysis. *See* Am. Pet. at 13-23. These arguments are equally unavailing.

The Eighth Circuit in *Southwestern Bell Telephone Co. v. Connect Communications Corp.* simply held that Southwestern Bell's claim that a state commission determination "violated federal law" was sufficient to confer subject matter jurisdiction to consider "that claim on the merits." 225 F.3d at 948. The Eighth Circuit determined that the claims in that case raised a number of federal issues over which the court could assert jurisdiction. *Id.* But the Eighth Circuit did not agree with Ameritech that interpretation of an interconnection agreement is an inherently federal question, nor did it dispute the other

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[3] The clear and unequivocal notice to states that their actions will be subject to federal court review under section 252(e)(6) does not appear to extend to state law issues, because that section only refers to actions in federal court to determine whether the state commission's determination "meets the requirements" of sections 251 and 252. A lack of clear notice would preclude a finding of waiver of immunity as to state law issues. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985).

courts' view of the role of state law in this area. Rather, the Eighth Circuit agreed that federal courts are to ensure only "compliance with federal law" and "[w]ith regard to purely state law issues, the state commissions may have the final say." *Id.*

The Fourth Circuit's decision in *AT&T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc.*, 229 F.3d 457 (4th Cir. 2000), likewise fails to provide grounds for certiorari. That case was factually distinct from this one in that it did not involve a challenge to a state commission decision interpreting or enforcing an interconnection agreement. Rather, it was a challenge at the approval stage. Further, the court did not purport to examine the appropriate scope of review under section 252(e)(6). Instead, it relied on the "inherent power of the court" to order a district court to consider reforming a negotiated interconnection agreement provision that was intimately related to an arbitrated provision after FCC and court decisions established the invalidity of that arbitrated provision. *Id.* at 466 n.4. The court cited equitable considerations for its actions: the provision at issue was negotiated at a time when applicable federal regulations specifically required such a provision, but those regulations were later invalidated, and *an arbitrated* provision intimately related to the negotiated provision at issue had been invalidated based on a separate change in federal law. *Id.* at 464-65; *see also AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 7 F. Supp. 2d 661, 670 & n.4 (E.D.N.C. 1998). None of those considerations

apply here. The Fourth Circuit did not even consider – much less disagree with – the Seventh Circuit's decision.[4]

Ameritech's reliance on the FCC's decision in *In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 F.C.C.R. 11227 (2000) ("*Starpower*"), is also misplaced. Ameritech claims that the FCC determined in *Starpower* that "any regulatory determination under section 252, whether by a state commission or by the FCC, interpreting an interconnection agreement presents a question of federal law that is reviewable in federal court." Am. Pet. 20. But the FCC in *Starpower* found that if state commissions refuse to interpret and enforce interconnection agreements, the FCC would undertake that duty pursuant to section 252(e)(5). *Starpower* says *nothing* about judicial review of state commission determinations or the law that governs interpretation of interconnection agreements. The order's only sentence regarding judicial review concerns review of *FCC* proceedings, and provides that "findings made by the [FCC] . . . and any judicial review of such findings shall be the exclusive remedies available to the parties." *Starpower* ¶ 9. That is a simple restatement of part of section 252(e)(6) that provides for review of FCC decisions, which must be in the Hobbs Act court. 47 U.S.C. § 252(e)(6). An *entirely separate* portion of section 252(e)(6) governs state commission review, and that is the provision at issue in this case. *Id.* Further, that the FCC is considering the contract issues in *Starpower* does not federalize them. Federal agencies routinely apply state law, subject to federal court review. *See, e.g., Nicor Exploration Co. v. FERC*,

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[4] As noted *infra*, the Fourth Circuit currently has under advisement two cases that much more closely resemble the instant case.

50 F.3d 1341, 1347-49 (5th Cir. 1995). While review of state commission decisions is limited to ensuring that any determination "meets the requirements of [s]ections 251 and [252]," that limitation does not apply to review of FCC decisions. 47 U.S.C. § 252(e)(6).

C. The circuits agree that state commission defendants are not immune from section 252(e)(6) actions under the Eleventh Amendment.

As for the Eleventh Amendment issues raised by the ICC, there is again no circuit conflict. Three circuits, including the Seventh, now have held that a case like this one is a "straightforward *Ex parte Young* case" that may be brought in federal court against the members of a state commission. *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000); *see MCI-II*, *supra*; *MCI Telecommunication Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-593).[5] This prevailing consensus is reflected in the fact that the

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[5] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to section 252(e)(6). *See, e.g.*, *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Public Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d. 1279 (N.D. Fla. 1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998).

Court has twice denied review on this very question during this Term.[6]

The ICC claims that there is a circuit conflict as to one of the alternate bases for rejecting the Eleventh Amendment defense that the Seventh Circuit has also embraced – waiver. But here again, the Tenth Circuit – the only other court of appeals to have addressed the question – is in full agreement with the Seventh Circuit. *See MCI Telecommunications Corp.*, 216 F.3d at 938.[7] The ICC cites *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), as supporting its position on waiver. ICC Pet. at 20. But the only reference to waiver of Eleventh Amendment immunity in that case is pure dicta in a footnote. 209 F.3d 922, n.6. The state commission, as a corporate entity, was not even a defendant in the case and the Sixth Circuit did not reach waiver because *Ex parte Young* applied.

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[6] *See Strand v. Michigan Bell Tel.*, 121 S. Ct. 54 (2000); *Strand v. Verizon North, Inc.*, 121 S. Ct. 380 (2000).

[7] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states voluntarily waive their sovereign immunity when they willfully participate in the Act's regulatory scheme. *See, e.g., Michigan Bell Tel. Co. v. Climax Tel. Co.*, 2000 U.S. Dist. LEXIS 15195 (W.D. Mich. Oct. 12, 2000); *GTE California, Inc. v. California Telecommunications Coalition*, Nos. C 99-03973 CW *et al.*, slip op. at 28-35 (N.D. Cal. Aug. 31, 2000); *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc., 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998).

II. The Issues Presented by the Petitions Are Still Developing in Other Circuits, the FCC, and Congress.

The Court should not grant review for the additional reason that the issues petitioners raise are pending and soon to be addressed in several additional circuits. Further, the FCC and Congress may act soon on issues pertaining to reciprocal compensation and those actions may severely limit the importance of any decision this Court might issue. It therefore makes sense for the Court to stay its hand at this time.

Cases closely resembling the Seventh Circuit's ruling at issue here are pending in the Fourth, Sixth, and Eleventh Circuits. *See BellSouth Telecommunications, Inc. v. North Carolina Utils. Comm'n*, No. 99-1845(L) (4th Cir.); *Bell Atlantic-Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, No. 99-2459 (4th Cir.); *Michigan Bell Tel. Co. v. MFS Intelenet*, No. 99-1996 (6th Cir.); *BellSouth Telecommunications, Inc. v. WorldCom Techs.*, Nos. 00-12809 (11th Cir.); *BellSouth Telecommunications, Inc. v. ITC DeltaCom*, No. 99-14728 (11th Cir.). Similar cases are pending in district courts within the First, Eighth and Ninth Circuits.

Especially given the absence of a circuit conflict, there is every reason to allow the questions presented here to be addressed in the first instance by these other circuits. Doing so would allow the relevant arguments and considerations to be further elaborated, and if no significant disagreement among the circuits emerges, there may never be need for this Court to undertake a review.

In addition, at the heart of Ameritech's claims is its assertion that federal law does not affirmatively require

reciprocal compensation for calls to ISPs. While the Carriers submit that this question is irrelevant, impending action by the FCC may moot Ameritech's claims altogether. The FCC is currently addressing whether the Act requires reciprocal compensation for calls to ISPs in remand proceedings resulting from *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). There, the D.C. Circuit vacated for want of reasoned decision making a prior FCC order concluding that the Act does not mandate reciprocal compensation for calls to ISPs. *Id.* at 3, 9. Should the FCC conclude that the Act does mandate this compensation, as the D.C. Circuit strongly suggested, Ameritech's claims would be moot. At a minimum, it makes little sense for this Court to grant review before the FCC and the D.C. Circuit have settled on the federal rule regarding reciprocal compensation for calls to ISPs.[8]

Finally, Ameritech's claim of urgency is unfounded. *See* Am. Pet. at 28-30. Ameritech will suffer no prejudice should the Court agree that this issue should work its way through the courts before granting certiorari. At the same time as it instituted this case in 1998, Ameritech separately filed a state court appeal in Illinois to challenge the ICC's order. *See* note 1 *supra*. That case has been stayed pending resolution of Ameritech's petition and will be returned to active status upon close of these federal proceedings. Thus, should this Court deny Ameritech's petition, proceedings in that state court action will commence and Ameritech will have a full opportunity to

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[8] Moreover, legislation proposed at the end of the last session would have addressed the question whether federal law should mandate or prohibit reciprocal compensation for calls to ISPs. *See* Reciprocal Compensation Adjustment Act of 2000, H.R. 4445, 106th Cong. (2000); Stephen Labaton, *Communications Lobby Puts Full-Court Press on Congress*, N.Y. Times, Oct. 24, 2000, at A1. This Court should not enter the fray when legislative initiatives are impending.

voice again any state law claim that the ICC misinterpreted the contracts.

III. The Seventh Circuit's Decision Is Correct.

Petitioners' arguments for review are also unpersuasive because the Seventh Circuit's ruling is correct.

A. Section 252(e)(6) applies to review of state commission "enforcement" determinations.

The Seventh Circuit did not err in holding that section 252(e)(6) provides federal jurisdiction to review a state commission order interpreting and enforcing an existing interconnection agreement. That provision states:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [sections 251 and 252 of the Act.]

47 U.S.C. § 252(e)(6). As four circuits have recognized, *see* p. 8 *supra*, it would make no sense to read this language as applying only to commission orders approving or rejecting interconnection agreements. To the contrary, when read in context and in light of the Act's structure and purpose, section 252(e)(6) is properly understood as providing that "[i]n any case in which a State commission makes a determination" about the meaning of an existing (*i.e.*, previously approved) interconnection agreement, a "party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement," as now

construed by the commission, "meets the requirements of section 251 [and 252]." 47 U.S.C. § 252(e)(6).

In attempting to ascertain legislative intent, courts do not "look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law." *Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1856) (internal quotation marks omitted)). Here, that means that section 252(e)(6) should be read in light of Congress's creation of a "new federal regime" that "fundamentally restructures local telephone markets." *AT&T Corp.*, 525 U.S. at 371, 378 n.6. This jurisdictional provision is an essential component of the new federal regime because it assures that state commission compliance with the Act will be assessed by federal courts, which can elaborate a uniform federal interpretation. As this Court has emphasized in discussing the Act: "The appeals . . . to what might loosely be called 'States' rights' are most peculiar, since there is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.* at 378 n.6.

It would have been particularly anomalous for Congress to have provided that federal courts have *exclusive* jurisdiction to review state commission orders approving interconnection agreements, while simultaneously not intending that federal courts entertain challenges to enforcement orders as violative of the Act. The ICC argues that the phrase "under this section" limits section 252(e)(6) to *approval* determinations, because those are the only determinations a commission makes "under" section 252. ICC Pet. at 12. But the ICC expressly invoked jurisdiction under the 1996 Act in adjudicating this dispute. Am. Pet. App. 77a, 84a. Thus, approval and later

enforcement/interpretation determinations are, in every practical sense, made "under" section 252, which is the key provision authorizing state commissions to play a role in this field.

In any event, this debate is largely academic. Even if the Court were to disagree with the circuit courts and interpret section 252(e)(6) not to confer jurisdiction on federal courts, then jurisdiction under 28 U.S.C. § 1331, in combination with 42 U.S.C. § 1983, would authorize parties to bring to federal court claims that state commission enforcement decisions had violated federal law. *See Strand*, 209 F.3d at 915-19; *Puerto Rico Tel. Co.*, 189 F.3d at 16; *see also City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 166-68 (1997) (recognizing that there is federal jurisdiction to review state administrative agency decisions where the party formulates an appropriate federal claim).

B. Section 252(e)(6) does not authorize review of state law claims.

The Seventh Circuit similarly was correct in concluding that section 252(e)(6) provides solely for review of federal claims. The statute's plain language compels that conclusion. Section 252(e)(6) authorizes a federal court to assess only whether a state commission's determination "meets the requirements of section 251 . . . and this section [252]" of the 1996 Act. 47 U.S.C. § 252(e)(6). As the First Circuit explained, "[i]f Congress intended federal courts' review to encompass any kind of alleged flaw in a state commission's determination, then there would have been little need to include the language 'meets the requirements of section 251 and . . . [section 252].'" *Puerto Rico Tel. Co.*, 189 F.3d at 14.

Ameritech insists that the bifurcated system resulting from the Seventh Circuit's view of section 252(e)(6) "make[s] no sense" because Congress should have "requir[ed] at least as much federal oversight" of state commission decisions as FCC decisions in order to "secure national uniformity". Am. Pet. 21-22. But section 252(e)(6) *does* provide federal court review for all questions of federal law arising from the determinations of state commissions and the FCC. For questions of state law contract interpretation, Ameritech's uniformity concern does not apply. Moreover, as noted above, this Court recognized in *Pennhurst* that the need to accommodate both federal and state interests could lead to bifurcated systems of review. 465 U.S. at 121-23.

Finally, Ameritech raises the specter of "grave Article III concerns." Am. Pet. at 16. It argues that if its state law challenge to the ICC's contract interpretation is successful, the Seventh Circuit's previous analysis of whether the ICC's determination violates federal law would be moot. But under section 252(e)(6), the test is whether the *state commission's* determination violated federal law, as the Seventh Circuit recognized. The answer to that question depends on the state commission's ruling, not hypothetical subsequent state court proceedings.

C. The Seventh Circuit correctly denied Ameritech's challenge to the ICC's orders.

The Seventh Circuit also was correct in rejecting Ameritech's argument that the ICC's alleged misinterpretation of the interconnection agreements as requiring reciprocal compensation for ISP calls was itself a violation of *federal* law. Ameritech raises two basic arguments in its attempt to federalize a breach of contract claim. First, it argues that

because interconnection agreements are required by the Act, and the Act imposes minimum requirements that apply unless the parties agree otherwise, the interpretation and enforcement of the agreements is inherently a federal issue.

This argument fails under the well-established rule that merely because Congress requires a contract by statute does not mean that every question regarding the interpretation of such a contract is a question of federal law. *Jackson Transit Auth.*, 457 U.S. at 22-23. The interpretation of contractual terms raises a question of federal law *only* if the provision at issue demonstrates that Congress plainly intended that "the rights and duties contained in [such a] contract [are] federal in nature." *Id.* at 23.

Ameritech's theory ignores *Jackson* and would require federal courts to fashion a federal common law of interconnection agreement interpretation. But federal courts may not create federal common law except in the most "narrow areas." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). Only in a "few and restricted" cases, "where there is a significant conflict between some federal policy or interest and the use of state law" should a court contemplate creating federal common law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (internal quotations and citations omitted). Even when dealing with a comprehensive federal statutory scheme, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *Id.* at 85.

Nothing in the 1996 Act suggests that Congress intended to transform every question regarding the meaning of an interconnection agreement term into a federal question. To the contrary, Congress expressly provided that "this Act . . . shall

not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." Pub. L. No. 104-104, Title V, § 601(c), 110 Stat. 43. Congress also expressly authorized states to impose in interconnection agreements pro-competitive state-law requirements that are consistent with the Act. 47 U.S.C. §§ 251(d)(3), 252(e)(3), 261(c). Obviously, Congress did not intend to preempt all state law.

Second, Ameritech argues that interconnection agreements are not "agreements" at all, but instead constitute "regulatory vehicles" that merely incorporate federal law requirements. Am Pet. at 23. If this were so, however, there would be no need for these elaborate interconnection agreements at all. Congress could have simply provided that incumbents must comply with the minimum requirements of federal law. As the Seventh and Fifth Circuits have recognized, it did not do so. "The Act clearly does not set out specific conditions which one party could enforce against the other. The details are left to the parties, or the commissions, to work out." Am. Pet. App. 12a (quoted in *Southwestern Bell*, 208 F.3d at 484-85).

Moreover, as Ameritech acknowledges, the Act itself provides that parties may "enter into a binding agreement . . . *without regard to the standards* set forth in" the Act. 47 U.S.C. § 252(a)(1) (emphasis added). Had Congress intended negotiated agreements to be governed exclusively by federal law, it would not have allowed parties to enter into them "without regard" to the Act's requirements.

In any event, even if the contract interpretation issue could be reached in this federal action, the ICC correctly interpreted the agreements' terms to require reciprocal compensation for calls to ISPs. Am. Pet. App. 10a-15a. Considered in light of

the custom and practice of the telecommunications industry, the agreements' terms demonstrate that Ameritech agreed to pay reciprocal compensation for calls to ISPs. *Id.* The ICC even applied factors that directly parallel those that the FCC suggested state commissions may consider when determining whether parties agreed to pay reciprocal compensation for calls to ISPs. *Id.* at 14a; *see In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP Bound Traffic*, 14 F.C.C.R. 3689, ¶ 24 (1999); *Starpower* ¶ 9. The ICC's decision is consistent with the decisions of four circuit courts, six federal district courts and over thirty state commissions. No court has held to the contrary.

D. The ICC does not have Eleventh Amendment immunity as to Ameritech's federal claims.

The Seventh Circuit's holding that the ICC defendants are not immune from a federal suit brought pursuant to section 252(e)(6) is firmly grounded in this Court's Eleventh Amendment jurisprudence. Consistent with *Ex parte Young*, the Act permits aggrieved parties to seek review of state commission determinations in federal court. The Act erects no limits on the equitable powers that federal courts have at their disposal to ensure that the state commissioners' actions comply with the Act's requirements. Moreover, in the spirit of cooperative federalism, Congress intended to encourage the participation of states in the regulation of interconnection matters addressed in the Act. Accordingly, the Act subjects any determination regarding interconnection agreements made by a state commission to review in federal court for compliance with federal law. Illinois' decision to accept Congress' invitation to regulate pursuant to the Act – a responsibility it

does not have to assume – constitutes a waiver of its Eleventh Amendment immunity within the meaning of *College Savings*.

1. *Ex parte Young* applies here.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials seeking prospective relief from ongoing violations of federal law is not treated as implicating a state's immunity under the Eleventh Amendment. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

Although the ICC argues otherwise, ICC Pet. at 28-29, these requirements are plainly satisfied here. As the Seventh Circuit put it in *MCI-II*, the "challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine." 222 F.3d at 345.

The ICC petitioners also argue that *Ex parte Young* applies *only* in constitutional cases. ICC Pet. at 24-28. But that argument completely misapprehends the *Ex parte Young* doctrine and this Court's holdings. *See, e.g. Coeur d'Alene*, 521 U.S. at 270 (*Ex parte Young* actions exist "to ensure the supremacy of federal statutory and constitutional law"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-74 (1996) (reaffirming that a proper *Ex parte Young* suit is one that seeks to challenge the "continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (barring suit in statutory case only to the extent plaintiffs sought

retrospective relief). The Court has never limited the doctrine in the manner petitioners imagine. Indeed, the Court has repeated that the *Ex parte Young* doctrine is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst State School & Hosp.*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. at 160).

Finally, the ICC petitioners attempt to rely on *Seminole Tribe*, where the Court held that the inclusion of an express and very limited set of judicial remedies in a statute impliedly precluded reliance on *Ex parte Young*. ICC Pet. at 21-24. But there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. 47 U.S.C. § 252(e)(6). That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it barred enforcement of those orders through contempt sanctions. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available under IGRA and an *Ex parte Young* action, where the typical remedy is an enforceable injunction.

There is nothing in section 252 that would limit federal court review in a remotely comparable manner. In fact, allowing *Ex parte Young* suits to proceed pursuant to section 252(e) realizes Congress's intent to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).[9]

In sum, it is hard to imagine a statutory remedy more synonymous with *Ex parte Young* than that provided by Congress here. Certainly the fact that the statute refers

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[9] *Seminole Tribe* also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the state." Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. Moreover, the term "state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. 47 U.S.C. § 153(41). Contrary to petitioners' claims, *see* ICC Pet. at 22-23, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

expressly to a federal cause of action cannot, without more, preclude reliance on *Ex parte Young*. That would flout, rather than vindicate, the intent of Congress.

2. A state's waiver of immunity obtained through its voluntary participation in the Act's regulatory scheme is consistent with *College Savings*.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that such a waiver must be clear and voluntary. 527 U.S. 666, 679 (1999); *see also Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing state conduct to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal Ry. Co. of Ala. State Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court held that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.")

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it stated that states do validly waive immunity when they knowingly accept a

gratuitous federal benefit expressly tied to a waiver. The Court illustrated this point by distinguishing two important cases in which statutory conditions placed on states by Congress were upheld although waiver was not formally declared by the states. *Id.* at 686-87. The Court recognized that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which [it] assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that *South Dakota v. Dole*, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their Eleventh Amendment immunity in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687.

These principles were appropriately applied by the Seventh Circuit here, where Congress created a set of federal standards and procedures applicable to local interconnection of competing carriers, and then offered states the "gratuitous" opportunity to participate in the new federal scheme, conditioned on the quite reasonable requirement that the state commissions' actions be reviewable for compliance with federal law in federal court. Thus, even if *Ex parte Young* were not available as a vehicle to allow federal court review of state

commission actions, the Eleventh Amendment would not apply because it is waived when states choose to participate in the review and enforcement of interconnection agreements.

CONCLUSION

For the reasons set forth above, both petitions should be denied.

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In the Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY,

Petitioner,

v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE OTHER COURTS OF APPEALS AND THE FCC.

A. The Carriers' contention (at 6) that "there is no genuine division among the circuits" on the question presented in Ameritech's petition rests on a misreading of the relevant decisions. Notably, even the Carriers do not include the Eighth Circuit within the grouping of circuits that purportedly "have agreed that a claim like Ameritech's in this case * * * raises issues of *state* law." Carriers Br. 6 (emphasis in original). At the same time, however, the Carriers cannot bring themselves to admit that in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942 (8th Cir. 2000), the Eighth Circuit found such a claim to be federal in nature. But that clearly was the Eighth Circuit's conclusion.

In *Connect*, the district court — expressly following the Seventh Circuit's decision below (see *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 72 F. Supp. 2d 1043, 1049 (E.D. Ark. 1999)) — ruled that the Act "'does not give the federal district courts jurisdiction to review a state commission's interpretation and enforcement of a privately negotiated interconnection agreement because that is a matter of state contract law that should properly be reviewed by a state court.'" *Connect*, 225 F.3d at 947. In an amicus brief filed in the Eighth Circuit, one of the Carrier respondents (MCI WorldCom, represented by the same counsel appearing before this Court) urged the Eighth Circuit to affirm the district court on the ground that the "district court, in substance, correctly applied" section 252(e)(6), because "[t]he Act leaves resolution of state law claims to state courts." Brief of Amicus Curiae MCI WorldCom in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 12 (filed Feb. 29, 2000). MCI also asserted that the First and Seventh Circuits "have held that claims that a state commission misinterpreted the terms of an interconnection agreement are governed by state law and should be reviewed by state courts" and urged the

Eighth Circuit not "to split with the well-reasoned decisions of the First and Seventh Circuit." *Id.* at 21-22. The Eighth Circuit reversed, stating that it "disagree[d]" with the rationale and holding of the district court (as quoted above), and upholding federal jurisdiction over Southwestern Bell's contention that the Arkansas Commission violated federal law by imposing obligations that deviated from the obligations set forth in Southwestern Bell's binding interconnection agreement. *Connect*, 225 F.3d at 947. In rejecting the notion that "this case is simply a matter of state contract law," the Eighth Circuit repeatedly stressed the "federal" nature of Southwestern Bell's claims. *Id.* at 947-48.

The Carriers gloss over the extensive quotations from the Eighth Circuit decision that Ameritech has cited above and in its petition, and hone in on the only sentence in the court's decision that even adverts to the possibility that the federal courts will not have the "final say" in matters relating to interconnection between carriers. In that sentence, the Eighth Circuit observed that in striking a "compromise" between "federal uniformity and state autonomy," Congress decided that "[w]ith regard to *purely* state law issues, the state commissions may have the final say." *Connect*, 225 F.3d at 948 (emphasis added). The Carriers would like the Court to infer from that sentence that the Eighth Circuit viewed Southwestern Bell's "interpretation" claim as arising under state law. When that sentence is placed in context, however, precisely the opposite inference is warranted.

The Eighth Circuit appended a citation to the First Circuit's decision in *Puerto Rico Tel. Co.* v. *Telecommunications Regulatory Bd.*, 189 F.3d 1 (1st Cir. 1999), to the sentence on which the Carriers rely. In *Puerto Rico*, the court found that it lacked jurisdiction to review an aggrieved carrier's claim because the "portion of the Board's order" at issue did "*not interpret the agreement*" at all, but rather applied a Puerto Rico

statute concerning the rights of telephone company customers. *Id.* at 11-12 (emphasis added).[1] It is a claim of *that* nature that the Eighth Circuit obviously was referring to in concluding that "purely state law issues" are not cognizable in federal court under section 252(e)(6). *Connect*, 225 F.3d at 948. But as the Eighth Circuit noted in the very next sentence of its opinion, this Court has stated that "there is no doubt * * * that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.* (quoting *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 379 n.6 (1999)). Where, as here and in *Connect*, an aggrieved carrier alleges that a state commission determination concerning the parties' rights and obligations under a section 252 interconnection agreement "violated federal law * * * it is entitled to the District Court's consideration of that claim" under section 252(e)(6) of the Act. *Connect*, 225 F.3d at 948.

B. The Carriers next dispute whether the FCC necessarily concluded in *In re Starpower Communications*, 15 F.C.C.R. 11277 (2000), that a claim identical in all material respects to Ameritech's claim here is federal in nature and thus reviewable in federal court under section 252(e)(6). In *Starpower*, the FCC held that it would preempt a state commission's jurisdiction and "proceed to resolve" a single question: "*whether the existing interconnection agreements between Starpower and GTE and*

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[1] In view of the First Circuit's holding that state commission action "fall[s] within the jurisdictional bounds of § 252(e)(6)" if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement" (189 F.3d at 9-10), it is clear that the First Circuit would agree with the Eighth Circuit (and disagree with the Seventh Circuit) that Ameritech's claim that the ICC refused to enforce an express limitation on the scope of Ameritech's obligations under its agreements with the Carriers is reviewable in federal court under section 252(e)(6).

Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic." *Id.* ¶ 9 (emphasis added). And as the Carriers concede (at 13), the FCC unmistakably expressed its view that its "findings" regarding that issue would be reviewable in a federal court of appeals pursuant to the Hobbs Act, as mandated under section 252(e)(6). The FCC's decision establishes conclusively that a claim like that asserted by Ameritech in this case arises under federal law, because (i) if such a claim arose under state law (as the Seventh Circuit held and as the Carriers continue to insist) and (ii) that claim were the only issue in the case (as was the case in *Starpower*), there would be no basis for a Hobbs Act court to exercise federal judicial power under Article III. It is well settled that a federal court lacks jurisdiction under Article III of the Constitution to decide a case between non-diverse parties in which the sole issue presented is one of state law. *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). Even if the Carriers are correct that "[f]ederal agencies routinely apply state law, subject to federal court review" (Carriers Br. 13), federal courts do not review cases or controversies of any kind without a jurisdictional basis under Article III.

The case that the Carriers cite, *Nicor Exploration Co.* v. *FERC*, 50 F.3d 1341 (5th Cir. 1995), illustrates our point. That case does not even suggest, much less hold, that federal courts may decide pure state law contract claims in the absence of any other basis for Article III jurisdiction. While the court did not expressly address the basis for its jurisdiction, the very first sentence of the opinion indicates the existence of a federal question in the case: a petition "to review a Federal Energy Regulatory Commission order granting * * * authority to collect incentive-based rates for natural gas pursuant to" a federal statute. *Id.* at 1344. The fact that a federal court may review a federal agency's application of state law when a state

law claim is ancillary to a federal claim within the scope of an Article III court's federal question jurisdiction or when federal common law looks to state law for a rule of decision says nothing at all about whether a federal court has Article III jurisdiction over a case in which the sole claim arises under state law — which would have been the case in *Starpower* under the Carriers' argument (and the decision below). In fact, an Article III court lacks jurisdiction over such a case.

C. Both the Eighth Circuit's decision in *Connect* and the FCC's decision in *Starpower* clash directly with the decision below on the question whether a claim like that asserted by Ameritech here is reviewable in federal or state court. Moreover, the decisions of the Tenth Circuit in *Southwestern Bell Tel. Co.* v. *Brooks Fiber*, 235 F.3d 493 (10th Cir. 2000), and the Fifth Circuit in *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n*, 208 F.3d 475 (5th Cir. 2000), also have squarely rejected the Seventh Circuit's bifurcated review scheme and have permitted claims that a state commission has disregarded express limitations on the scope of a carrier's obligations under a section 252 agreement to be reviewed in federal court. The Tenth Circuit concluded (erroneously, we believe) that such a claim arises under state law, but found the claim cognizable in federal court under 28 U.S.C. § 1367. *Brooks Fiber*, 235 F.3d at 498. The Tenth Circuit believed that the Fifth Circuit had "at least implicitly" reached the same conclusion under the same rationale (*id.*), but the Fifth Circuit's holding suggests otherwise. In concluding that "federal jurisdiction *under the Act* * * * permit[s] district courts * * * to review" issues such as "the questions of interpretation of the contracts" under a deferential standard of review (208 F.3d at 482, 485) (emphasis added), the Fifth Circuit indicated (albeit obliquely) that questions relating to the interpretation of section 252 agreements arise under federal law (section 252(e)(6)), but are to be resolved by applying "state law principles" as the rule

of decision. In any event, even if the Carriers were correct in asserting that the Fifth Circuit would treat Ameritech's claim here as a state law matter, that court, like the Eighth and Tenth Circuits, unmistakably rejected the Seventh Circuit's unduly narrow construction of the scope of federal review.

In sum, the circuits are divided, and in some respects fractured, with respect to the question presented in this petition: whether a claim that a state commission "determination" concerning the rights and obligations of the parties to section 252 interconnection agreement deviated from the plain terms of that agreement is reviewable in federal court.

II. THIS COURT SHOULD RESOLVE THE CONFLICT ON THIS IMPORTANT AND FREQUENTLY LITIGATED QUESTION.

The Carriers agree that interconnection agreements are a "key feature of the system set up by the 1996 Act," which "imposes a new set of federal standards and procedures governing interconnection between incumbent local companies and potential competitors." Carriers Br. 1, 2. And the Carriers do not dispute the heavy volume of litigation nationwide involving issues relating to the interpretation of scores of disputes over the parties' rights and obligations under federally mandated section 252 interconnection agreements. Nevertheless, the Carriers contend that this Court should "defer addressing the issues raised" here until a few more circuits weigh in on the question presented. *Id.* at 6-7; see also *id.* at 16-17. But the fact that other circuits are likely to choose one side or another of a conflict simply underscores Ameritech's point that the question presented is important and that it arises frequently. Once the Fourth, Sixth, and Eleventh Circuits issue their decisions, the Carriers no doubt will argue in cases that are decided in their favor that the Court should wait for the First, Second, Third, and D.C. Circuits as well. In view of the

confusion in the circuits that already exists and the centrality of interconnection agreements to the "new federal regime" that governs "a crucial segment of the economy worth tens of billions of dollars" (*AT&T Corp.*, 525 U.S. at 379 n.6, 397), there is no justification for delaying this Court's much needed guidance until every circuit has rendered an opinion on the issue.

The Carriers also contend that this Court should stay its hand because "relevant issues concerning reciprocal compensation for calls to ISPs are reportedly the subject of impending federal agency and potential legislative action." Carriers Br. 7. But even if those rumored proceedings yield tangible results, those results would have no bearing on the question presented in Ameritech's petition. That question does not even mention reciprocal compensation, and neither the FCC's decision on remand in *Bell Atlantic* nor any legislative proposal of which we are aware would obviate the need for deciding this question. (Indeed, as shown above, in *Starpower* the FCC already indicated its views on the question presented.) The importance of the jurisdictional question presented here is not tied in any way to the substance of any particular type of interconnection agreement dispute arising under the 1996 Act.

III. THE SEVENTH CIRCUIT'S DECISION IS PLAINLY WRONG.

The Carriers' contention that review should be denied on the ground that the decision below is actually correct is wholly unavailing. Notwithstanding the confusion and disarray in the courts of appeals discussed above, the one proposition on which all of the courts agree is that the Seventh Circuit's decision is wrong. As the Tenth Circuit observed, the bifurcated

jurisdictional scheme that the Seventh Circuit felt compelled to adopt is "absurd." *Brooks Fiber*, 235 F.3d at 498 n.2.[2]

That scheme not only results in what the Tenth Circuit described as a "waste of judicial resources" (*Brooks Fiber*, 235 F.3d at 498), but it is contrary to the structure and frustrates the manifest purposes of the Act. It is universally accepted that when a state commission imposes obligations on a carrier in arbitrating an interconnection agreement dispute, the commission's determination is reviewable in federal court under section 252(e)(6) for compliance with federal law. And as the FCC has observed, "[s]tate commission determinations that interpret and give effect to interconnection agreements are often the principal mechanism for establishing the substance of the parties' obligations under the 1996 Act." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 19 (8th Cir. filed Mar. 22, 2000). But under the decision below, whether a carrier may obtain federal judicial review of a state commission decision concerning a dispute over the carriers' interconnection obligations turns solely on the timing of the dispute. This makes no sense. Denying federal review over state commission determinations that are identical in substance simply because "the dispute * * * remained latent until after the agreement was approved" plainly "defeat[s] the federal oversight Congress intended." *Id.* at 20 n.8. As the "structure" of the Act reveals, "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place" *MCI Telecommunications Corp.* v. *Illinois Bell Tel. Co.*, 222

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[2] Contrary to the Carriers' suggestion (at 11), the Seventh Circuit plainly viewed the "forced bifurcation" as compelled by the Act, not by the Eleventh Amendment or this Court's decision in *Pennhurst*. See Pet. App. 17a.

F.3d 323, 341 (7th Cir. 2000), cert. denied, 69 U.S.L.W. 3297 & 3346 (U.S. Jan. 22, 2001) (Nos. 00-653 & 00-744).[3]

The section 252 agreements at issue here, like many similar agreements, incorporate provisions that "plainly track[] controlling law," and thus require state commissions and courts construing those provisions to give meaning to the parties' intent to implement the "requirements of the Act." *AT&T Communications* v. *BellSouth Telecommunications*, 229 F.3d 457, 465 (4th Cir. 2000).[4] When parties to federally mandated section 252 agreements choose to negotiate "with regard to the 1996 Act" (*id.*) in implementing the Congressionally prescribed procedural and substantive framework for local telecommunications competition, they have a federally guaranteed right to hold other parties to the terms of the deal. As one court recently held, under section 252(a)(1) of the Act,

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[3] The Carriers attempt to camouflage the unanimous view of the circuits that state commission actions "interpreting" interconnection agreements are regulatory "determinations under" section 252 by stating that "[f]our circuits * * * have all held that a federal court does have jurisdiction under section 252(e)(6) to consider whether a state commission violated federal law in a ruling *enforcing* a previously approved interconnection agreement." Carriers Br. 6 (emphasis in original). See also *id.* at 18 ("Section 252(e)(6) applies to review of state commission 'enforcement' determinations"). What the decisions of those circuits actually hold, however, is that *both* "interpretation" and "enforcement" decisions are "determinations under" section 252. See Pet. 14 n.3.

[4] And as the FCC has explained, although a negotiated agreement "need not comply" with the requirements of the Act, "it is critical to recognize that even 'freely' negotiated agreements are formed against the backdrop of mandatory obligations under section 251 that will be imposed through arbitration if the parties fail to agree." Brief for the United States and the FCC as Intervenors in *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, No. 99-3952, at 26 n.13.

"interconnection agreements are binding documents," and a state commission thus "violate[s] the Act" when it disregards express limitations on the rights and obligations of the parties as set forth in the agreement and imposes obligations inconsistent with that agreement. *Michigan Bell Tel. Co.* v. *MCI Metro Access Transmission Services, Inc.*, No. 00-70636, slip op. at 19 (E.D. Mich. Jan. 22, 2001). Ameritech has alleged precisely the same state commission action here, and if Ameritech can prove its claim, the state commission will have "regulated in a manner that is inconsistent with the Act." *Id.* at 20. The court below erred in concluding — contrary to the decisions of the Fifth, Eighth, and Tenth Circuits and the FCC — that a claim of this nature must be litigated in state court. Because Ameritech's claim seeks review of the commission's determination for compliance with federal law requirements created by the Act, it arises under federal law and falls directly within the scope of federal jurisdiction under section 252(e)(6).[5]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] Contrary to the Carriers' assertion, *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15 (1982), in no way supports the result in the Seventh Circuit. In *Jackson*, this Court reaffirmed the principle that "a plaintiff state[s] a federal claim when he sue[s] to vindicate contractual rights set forth by federal statutes, [even though] the relevant statutes lacked express provisions creating federal causes of action." *Id.* at 22. The Court found that this principle did not apply in *Jackson*, however, because the legislative history of the relevant statute established "conclusive[ly]" that "Congress intended that labor relations between transit workers and local governments would be controlled by state law." *Id.* at 24. In sharp contrast, Ameritech is suing here under an express federal right of action under section 252(e)(6) to enforce rights implementing the 1996 Act and made binding by section 252(a)(1) of the Act.

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FEBRUARY 2001

(4) (4)

Nos. 00-878 and 00-921

IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

RICHARD L. MATHIAS, *et al.*,
Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES LLC, AND FOCAL COMMUNICATIONS CORP.

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Pursuant to Supreme Court Rule 15.8, respondents file this supplemental brief to bring to the Court's attention the rulings issued by the United States Court of Appeals for the Fourth Circuit on February 14, 2001, in *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.* (Nos. 99-2459, -2616) and *BellSouth Telecommunications, Inc. v. North Carolina Utilities Commission* (Nos. 99-1845, -1846, -1847, -1970). These decisions address questions closely related to the Eleventh Amendment and subject matter jurisdiction issues raised by the Illinois Commerce Commission in this case. They do so in ways that arguably conflict with the ruling of the Seventh Circuit on those questions. Copies of the opinions have been lodged with the Clerk.

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No.00-921

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v.

WORLDCOM TECHNOLOGIES, INC., ET AL.,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 15.8, petitioner Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech") respectfully submits this supplemental memorandum to call to the Court's attention developments in related cases before this Court (Nos. 00-878, 00-1531, and 00-1711) that bear on the proper disposition of this petition (No. 00-921).

BACKGROUND

On November 28, 2000, the Commissioners of the Illinois Commerce Commission filed a petition for a writ of certiorari, No. 00-878, from the Seventh Circuit's decision in *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999). On the same day, Ameritech filed a cross-petition, No. 00-921, from the same Seventh Circuit decision.

On March 5, 2001, this Court granted certiorari in No. 00-878 on three questions. Question 1 is "[w]hether a state commission's action relating to the enforcement of a previously approved section 252 interconnection agreement is a 'determination under [section 252]' and thus is reviewable in federal court under 47 U.S.C. § 252(e)(6)." *Mathias* v. *WorldCom Technologies, Inc.*, 121 S. Ct. 1224 (Mar. 5, 2001) (No. 00-878) ("*Mathias*").[1]

Ameritech's cross-petition, No. 00-921, remains pending before the Court and appears to have been held for disposition in light of *Mathias*. The question presented in the cross-petition — "[w]hether a claim that a state commission determination concerning the rights and obligations of the parties to a section 252 agreement deviated from the plain terms of that agreement lies within the scope of federal jurisdiction under section 252(e)(6)" — is fairly subsumed within Question 1 on which the Court granted certiorari in *Mathias*. See Stern, et al.,

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[1] The two remaining questions presented in *Mathias* relate to the Eleventh Amendment and the *Ex parte Young* doctrine.

SUPREME COURT PRACTICE 338-339 (7th ed. 1993). Ameritech, AT&T, WorldCom, and petitioners all briefed the issue presented in Ameritech's cross-petition in their briefs in *Mathias*, and that issue received considerable attention at oral argument.

After the Court granted certiorari in *Mathias*, petitions for writs of certiorari were filed in Nos. 00-1531 & 00-1711 that "presented the same questions at issue in *Mathias* v. *WorldCom Technologies, Inc.*, 00-878, plus the additional question of subject matter jurisdiction under 28 U.S.C. § 1331." Order in Nos. 00-1531 & 00-1711 (U.S. Dec. 12, 2001) ("December 12 Order"). On June 25, 2001, this Court granted certiorari on the single "additional question" presented in Nos. 00-1531 and 00-1711: "[w]hether a federal district court has independent subject matter jurisdiction under 28 U.S.C. § 1331 to determine whether a state public utility commission's action interpreting or enforcing an interconnection agreement violates the Telecommunications Act of 1996." *Verizon* v. *Public Service Comm'n of Maryland*, 121 S. Ct. 2548 (June 25, 2001) (No. 00-1531), and *United States* v. *Public Service Comm'n of Maryland*, 121 S. Ct. 2548 (June 25, 2001) (No. 00-1711) (collectively, "*Verizon*").

On December 5, 2001, this Court heard oral argument in *Mathias* and *Verizon*. A week later, this Court issued an Order stating that it "may be unable to reach the merits of the questions presented in *Mathias*." December 12 Order. To ensure that it has jurisdiction "over all of the questions at issue in these cases," this Court granted certiorari on the three remaining questions presented in *Verizon* and requested further briefing on those questions. *Id.*

DISCUSSION

Ameritech respectfully submits this supplemental brief to call to the Court's attention the fact that the statutory jurisdiction issues that will be briefed and decided in the *Verizon* case pursuant to the Court's December 12 Order are

identical to the statutory jurisdiction issues raised in Ameritech's pending cross-petition. Accordingly, for the reasons that follow, Ameritech's cross-petition should — at a minimum — be held pending the Court's decision in *Verizon*, and disposed of as appropriate in light of the decision in that case. Alternatively, the Court could simply grant Ameritech's cross-petition in No. 00-921, which, as noted above, raises the identical statutory jurisdiction issue that already has been fully briefed in *Mathias* and will be briefed again in *Verizon*.[2]

In both *Mathias* and *Verizon*, the disputes between the private carriers that lie at the heart of the statutory jurisdiction issues before the Court involve provisions of section 252 interconnection agreements that govern the carriers' reciprocal compensation obligations. The specific provisions at issue in Ameritech's agreements state that the parties' reciprocal compensation obligations are "As Described in the Act" (J.A. in No. 00-878 at 8a, 14a, 20a, 30a, 38a; C.A. SA48, SA57, SA80, SA89; SA100), which is in turn defined in each agreement to mean "as described in or required by the Act" (J.A. in No. 00-878 at 8a, 13a, 19a, 30a, 37a; C.A. SA39, SA53, SA71, SA85, SA96). The pertinent provisions of the agreement at issue in *Verizon* say precisely the same thing. Pet. App. in No. 00-1531 at 101a; C.A. App. 49, 55 (quoting Interconnection Agreement §§ 1.7, 1.61); see also Brief for Petitioners in No. 00-1531 at 19.

In both cases, the state commission resolved in the first instance the question whether the agreements required the payment of reciprocal compensation on calls to the Internet. See J.A. in No. 00-878 at 114a; Pet. App. in No. 00-921 at 78a-

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[2] Ameritech's petition was timely filed as a cross-petition, not a conditional cross-petition (see Rule 13.4). Accordingly, even if the Court ultimately holds that it lacks jurisdiction over the Commissioners' petition (No. 00-878), the Court may grant Ameritech's cross-petition (No. 00-921), vacate the judgment below, and remand for further proceedings in light of *Verizon*.

79a; Pet. App. in No. 00-1531 at 94a-96a. And in both cases, the party aggrieved by the commission's determination brought an action in federal district court, under 47 U.S.C. § 252(e)(6) and 28 U.S.C. § 1331, contending that the commission's misinter-pretation of the agreements violated federal law by nullifying agreement provisions that expressly limit the parties' reciprocal obligations to the requirements of the 1996 Act. See Ameritech Br. in No. 00-878 at 15; Verizon Br. in No. 00-1531 at 17.

However, both the Seventh Circuit and the Fourth Circuit refused to decide the merits of Ameritech's and Verizon's "misinterpretation" claims, holding that the federal courts lack jurisdiction over such claims. See *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999); *Bell Atlantic Maryland, Inc.* v. *MCI WorldCom, Inc.*, 240 F.3d 279, 301-09 (4th Cir. 2001). The Fourth Circuit expressly found federal jurisdiction lacking over a challenge to the correctness of a state commission's interpretation of a section 252 interconnection agreement under both section 252(e)(6) and section 1331. See *Bell Atlantic*, 240 F.3d at 305, 307 (section 252(e)(6)); *id.* at 309 (section 1331). Although the Seventh Circuit did not expressly reference section 1331 in the critical passages of its opinion, it plainly rejected Ameritech's contention that the federal courts have federal question jurisdiction under section 1331 over its misinterpretation claim when it held that "[a] decision 'interpreting' an agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Illinois Bell*, 179 F.3d at 574.

The Seventh Circuit's failure to specifically address section 1331 in its opinion is immaterial to the proper disposition of Ameritech's cross-petition, because Ameritech fully preserved its argument that section 1331 provides an alternative basis for federal jurisdiction over an "interpretation" claim. See Pet. in No. 00-1711 at 13 (expressing Solicitor General's view that "this Court could consider in *Mathias* whether federal court

jurisdiction to review such state commission determinations exists under 28 U.S.C. § 1331" despite the fact that the Seventh Circuit did not expressly address that question). To begin with, in its federal complaint, Ameritech asserted jurisdiction under both sections 252(e)(6) and 1331. See J.A. in No. 00-878 at 126a-127a. The district court determined that it had jurisdiction under section 252(e)(6) and thus noted that it did not have to consider whether jurisdiction also existed under section 1331. See Pet. App. in No. 00-878 at 29 n.3; Pet. App. in No. 00-921 at 56a-57a n.3. In the court of appeals, Ameritech again preserved its section 1331 argument (Ameritech C.A. Br. at 31-34), but the Seventh Circuit did not address that argument because it concluded that (i) jurisdiction existed under section 252(e)(6) over some of Ameritech's claims (*Illinois Bell*, 179 F.3d at 570-71) and (ii) there was no basis for federal jurisdiction at all over what the Seventh Circuit considered to be Ameritech's state contract law "interpretation" claim (*id.* at 574).

In sum, the issues before this Court arising out of the Seventh Circuit's decision (Nos. 00-878 and 00-921) and the Fourth Circuit's decision (Nos. 00-1531 and 00-1711) involve (i) identical interconnection agreement provisions on reciprocal compensation, (ii) identical state commission determinations on the scope of the parties' reciprocal compensation obligations, (iii) identical claims challenging the state commission interpretations underlying those determinations, and (iv) identical refusals by the courts of appeals to find federal jurisdiction over such claims. Thus, the Court's decision on the statutory jurisdiction issues in *Verizon* will be dispositive of the same issues presented in Ameritech's cross-petition in No. 00-921. Ameritech respectfully submits that, if this Court decides in *Verizon* that the federal courts have jurisdiction to decide a claim that a state commission has misinterpreted the binding terms of a section 252 interconnection agreement — whether under section 252(e)(6) or section 1331 — then the Court should grant the cross-petition, vacate the judgment of the

Seventh Circuit, and remand the case so that Ameritech may obtain a decision on the merits, in federal court, of the claim that the Seventh Circuit refused to decide.

CONCLUSION

For the reasons stated above, Ameritech respectfully submits that its cross-petition, No. 00-921, should be held pending this Court's decision in *Verizon*. Alternatively, the Court may grant the cross-petition and consider together all four of the cases — Nos. 00-878, 00-921, 00-1531, and 00-1711 — in which the identical statutory jurisdiction questions are presented.

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SUPPLEMENTAL BRIEF FOR PETITIONER

This cross-petition seeks review of the Seventh Circuit's decision in *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999). On March 5, 2001, this Court granted certiorari in No. 00-878, in which the Illinois Commerce Commissioners sought review of the same decision below. Earlier this week, this Court issued a *per curiam* opinion dismissing the writ of certiorari in No. 00-878 as improvidently granted. *Mathias* v. *WorldCom Technologies, Inc.*, ___ U.S. ___, slip op. at 2, 2002 WL 1008881 (U.S. May 20, 2002).

On the same day, in *Verizon Md., Inc.* v. *Public Serv. Comm'n of Md.*, Nos. 00-1531 & 00-1711, ___ U.S. ___, 2002 WL 1008485 (U.S. May 20, 2002), this Court held that there is "no doubt that federal courts have jurisdiction under § 1331" to decide a claim that "the Commission violated the Act and [an] FCC ruling when it ordered payment of reciprocal compensation for ISP-bound calls." Opinion of the Court at 6. In *Verizon*, this Court also held that a lawsuit asserting such a claim "may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*." *Id.* at 8.

However, the Court did not reach in *Verizon* the question presented in Ameritech's cross-petition — namely, whether a claim that a state commission's misinterpretation of the binding terms of a section 252 interconnection agreement that expressly limit the parties' rights and obligations to the scope of their obligations under federal law is governed by federal or state law. See Opinion of the Court at 10 ("it may (or may not) also be true that state contract law, and not federal law as Verizon contends, applies to disputes regarding the interpretation of Verizon's agreement"); Opinion of Souter, J., joined by Ginsburg and Breyer, J.J., concurring, at 2 n.4 ("Whether the interpretation of a reciprocal-compensation provision in a privately negotiated interconnection agreement presents a

federal issue is a different question which neither the Court nor I address at the present"). As demonstrated in Ameritech's cross-petition, that issue has created enormous confusion and spawned considerable litigation in the federal courts across the country. Some courts, including the Seventh Circuit in the decision below, have adopted the view that a claim that a state commission has disregarded the terms of a section 252 interconnection agreement arises under state law and must be decided in the state courts. Other courts, and significantly the FCC in its recent decision in *Starpower Communications, LLC* v. *Verizon South, Inc.*, FCC 02-105 (Apr. 8, 2002) ("*Starpower II*"), have taken the view that such a claim is federal in nature and can be litigated in federal court. The pending cross-petition squarely presents this important and pervasive issue in a ripe case. This Court should grant the petition and resolve the question that it left open in *Verizon*.

DISCUSSION

The critical question that remains unanswered after *Verizon* is whether a claim that a state commission has nullified the provisions of a section 252 interconnection agreement that expressly limit the parties' rights and obligations to the requirements of federal law constitutes an ordinary issue of state contract law reviewable in state court (as the Seventh Circuit held in the decision below) or an issue of federal interest and concern reviewable in federal court (as the FCC recently held in *Starpower II*). This question raises an issue of utmost importance because countless section 252 agreements include provisions that purposely set forth the parties' duties in terms of the requirements of the federal Act. Indeed, the agreements at issue in this case and in *Starpower II* have such provisions, as did the agreements at issue in *Verizon*.[1] This Court's urgent

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[1] Here, for example, the reciprocal compensation provisions chosen by Ameritech and its competitors state that the parties' reciprocal compensation obligations are "As Described in the Act" (J.A. in No. 00-878 at 8a, 14a, 20a, 30a, 38a; C.A. SA48, SA57, SA80, SA89;

attention to this issue is warranted because the federal courts (and the FCC) are in disarray with respect to the proper forum for resolving disputes over the interpretation of the terms of those agreements.

Contrary to the Seventh Circuit's view, a section 252 interconnection "agreement" is not an ordinary, voluntary commercial contract governed by state law. Rather, a section 252 agreement is a federal regulatory vehicle, created by Congress for the sole purpose of implementing the rights and obligations created by the federal Telecommunications Act of 1996 ("the 1996 Act"). As this Court has recognized, the 1996 Act imposes on incumbent local exchange carriers "a host of duties intended to facilitate market entry" by competitors. *AT&T Corp.* v. *Iowa Utilities Bd.*, 525 U.S. 366, 371 (1999). Among other things, "the incumbent LEC *must* 'provide * * * interconnection with' the incumbent's existing network, § 251(c)(2), and the carriers *must* then establish 'reciprocal compensation arrangements' for transporting and terminating the calls placed by each others' customers, § 251(b)(5)." *Verizon*, Nos. 00-1531 & 00-1711, Opinion of the Court at 2

SA100), which is in turn defined in each agreement to mean "as described in or required by the Act" (J.A. in No. 00-878 at 8a, 13a, 19a, 30a, 37a; C.A. SA39, SA53, SA71, SA85, SA96). The agreements between Starpower and Verizon Virginia at issue in the FCC's recent *Starpower II* decision contained similar reciprocal compensation terms. One of those agreements defined reciprocal compensation to be "as described in the Act," which is defined to mean "as described in or required by the Act." Compare *Starpower II* ¶¶ 6, 29 n.96 with J.A. in No. 00-878 at 8a, 13a-14a, 19a-20a, 30a, 37a-38a. And the reciprocal compensation provisions of both Starpower-Verizon Virginia agreements in *Starpower II* (see ¶¶ 6, 7, 12, 31), like the language in the Ameritech agreements at issue here, tracked the language of the Act and the FCC's rule interpreting the Act. The agreement in *Verizon* also is substantively identical to the agreements involved in *Starpower II*. See Post-Argument Supp. Br. of Verizon Maryland in Nos. 00-1531 & 00-1711 at 3 & n.1.

(emphasis added). Interconnection agreements are the means of accomplishing those federal mandates and constitute the "binding" statement of the parties' rights and obligations under the Act. 47 U.S.C. § 252(a)(1).

The forced sharing of facilities by business rivals under the Act creates an unusual competitive environment, pursuant to which incumbents naturally will not give more – and competitors naturally will not accept less – than the Act requires. In these circumstances, it is not surprising that the terms of section 252 agreements frequently track the requirements of federal law and "represent nothing more than an attempt to comply with the requirements of the 1996 Act." *AT&T Communications* v. *BellSouth Telecomms., Inc.*, 229 F.3d 457, 465 (4th Cir. 2000). And where interconnection agreement terms "reveal an intent to track the Commission's interpretation of the scope of section 251(b)(5)," the FCC has held that "whatever the Commission determines is compensable under section 251(b)(5) will be what is compensable under the Agreements." *Starpower II* ¶ 31.

Notwithstanding the fact that the interconnection terms at issue implement the reciprocal compensation requirements of the federal Act and expressly limit the parties' obligations to those federal law requirements, the Seventh Circuit held that "[a] decision 'interpreting' an [interconnection] agreement contrary to its terms creates a different kind of problem – one under the law of contracts, and therefore one for which a state forum can supply a remedy." *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566, 574 (7th Cir. 1999); Pet. App. 17a. Accordingly, the court refused to decide Ameritech's claim that the Illinois Commerce Commission nullified binding, federal-law based, limitations on the scope of Ameritech's obligation to pay reciprocal compensation under section 251(b)(5) of the Act. In *Starpower*, the FCC, standing in the shoes of a state commission pursuant to section 252(e)(5) of the Act, addressed precisely the same claim: "whether the existing interconnection agreements between Starpower and GTE and

Bell Atlantic require GTE and Bell Atlantic to pay compensation to Starpower for the delivery of ISP-bound traffic." *In re Starpower Communications, LLC*, 15 F.C.C.R. 11277 ¶ 9 (2000). But, in contrast to the Seventh Circuit, the FCC determined that such a claim presented a *federal* question that could be resolved by a *federal* agency under section 252(e)(5), subject to exclusive review in a *federal* court of appeals under section 252(e)(6) of the Act. And, in concluding that "Virginia law *supplies the applicable rules* of contract interpretation" (*Starpower II* ¶ 24 emphasis added)), the FCC followed this Court's frequent practice of borrowing state law as "the *federal* rule of decision" even though the "source of law is *federal*." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 718, 728 (1979) (emphasis added).[2]

The decision below and *Starpower* are merely illustrative of the pervasive confusion in the lower courts and the FCC over the question whether a claim that a state commission has nullified a term of a "binding" federally-mandated interconnection agreement that limits the parties' obligations to the requirements of the federal Act should be decided in state or federal court.[3] As demonstrated in Ameritech's cross-petition,

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[2] See also *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-98 (1991) (holding that although the rule of decision for a private cause of action under a federal statute "is necessarily federal in character," federal courts should "'incorporat[e] [state law] as the federal rule of decision'") (quoting *Kimbell Foods*, 440 U.S. at 728).

[3] Congress simply could not have meant for interconnection disputes arising from the same agreement to run the gauntlet of two separate judicial systems, as the Seventh Circuit would require, with some issues litigated first in the federal system and other issues litigated years later in the state system, and with wasteful arguments over which issues fall on one side or another of the federal-state divide. See *Bank One Chicago* v. *Midwest Bank & Trust Co.*, 516 U.S. 264, 275-276 (1996) (refusing to fragment jurisdiction under federal statute; "even if the text of [the statute] could plausibly be red to

the disarray in the circuits as to the proper rationale and result in such cases is widespread and identical claims are reviewed in different court systems depending on the circuit in which the claim was brought. See Pet. at 13-23; Reply Br. at 1-6. And since the cross-petition was filed, the confusion in the circuits has only deepened. See, *e.g.*, *BellSouth Telecomms., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 278 F.3d 1223, 1232-37, 1243 (11th Cir. 2002) (holding not only that a claim challenging a state commission interpretation of an interconnection agreement "is a simple matter of common law contract interpretation," but also that federal law does not authorize state commissions to interpret and enforce an interconnection agreement at all). This Court should grant the cross-petition to decide the important question presented that, absent this Court's guidance, will continue to vex the lower courts.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted and the case set for briefing and argument. In the alternative, the petition for a writ of certiorari should be granted and the decision below should be vacated and remanded for further proceedings in light of *Verizon*.

Respectfully submitted.

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create this decidedly inefficient jurisdictional scheme, we would hesitate to attribute such a design to Congress").

(7)

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IN THE

Supreme Court of the United States

ILLINOIS BELL TELEPHONE CO.,

Petitioners,

v.

WORLDCOM TECHNOLOGIES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL OPPOSITION OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

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SUPPLEMENTAL OPPOSITION OF RESPONDENTS WORLDCOM TECHNOLOGIES, INC., MCI WORLDCOM NETWORK SERVICES, INC., AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC

Respondents WorldCom Technologies, Inc., MCI WORLDCOM Network Services, Inc., MCImetro Access Transmission Services, Inc. (collectively "WorldCom"), through undersigned counsel, submit this supplemental brief in opposition to the petition for writ of certiorari filed by Illinois Bell Tel. Co. d/b/a Ameritech Illinois ("Ameritech") and in support of the decision of the United States Court of Appeals for the Seventh Circuit in *Illinois Bell Tel. Co. v. WorldCom Techs.*, 179 F.3d 566 (7th Cir. 1999).

ARGUMENT

Ameritech sought a writ of certiorari from the Court on "[w]hether a claim that a state commission determination concerning the rights and obligations of the parties to a section 252 agreement deviated from the plain terms of that agreement lies within the scope of federal jurisdiction under section 252(e)(6)." (Amer. Pet. at i (corrected version).) For the reasons previously discussed by WorldCom in the January 16, 2001 Response in Opposition of Respondents WorldCom Technologies, et al. ("WorldCom Resp."), this Court should deny Ameritech's petition for writ of certiorari. There is no genuine circuit split on that question; these issues are still working their way through several circuit courts, including the Sixth, Ninth, and Eleventh Circuits; and the Seventh Circuit correctly resolved the question Ameritech presented. (*See generally* WorldCom Resp.) In addition, WorldCom's briefs filed in *Mathias v. WorldCom Techs.*, 535 U.S. __, No. 00-878,

slip op. (May 20, 2002), and *Verizon Maryland, Inc. v. MCI WorldCom, Inc.*, 535 U.S. __, Nos. 00-1531, 00-1711, slip. op. (May 20, 2002), discussed this issue exhaustively.

More specifically, the three circuits that have expressly considered the question have each ruled that state law governs the interpretation of negotiated interconnection agreements. *Southwestern Bell Tel. Co. v. Brooks Fiber Communications*, 235 F.3d 493, 497-99 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n*, 208 F.3d 475, 485 (5th Cir. 2000); *Illinois Bell Tel. Co. v. WorldCom Techs.*, 179 F.3d 566, 574 (7th Cir.1999), *cert. dismissed sub nom., Mathias v. WorldCom Techs.*, 535 U.S. __, slip op. (May 20, 2002). In addition, two other circuits have concluded in similar decisions that questions regarding the interpretation of negotiated interconnection agreements arise under state law, not federal law. *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Servs.*, 278 F.3d 1223, 1242 (11th Cir. 2002), *petitions for rehearing pending*; *Bell Atlantic Maryland, Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 297 (4th Cir. 2001), *vacated and remanded on other grounds sub nom., Verizon Maryland, Inc. v. Pub. Serv. Comm'n*, 535 U.S. __, Nos. 00-1531, 00-1711, slip op. (May 20, 2002). The Sixth, Ninth, and Eleventh Circuits have pending cases that will address this issue in those circuits. *See Michigan Bell Tel. Co. v. MFS Intelenet*, No. 99-1996 (6th Cir.); *Verizon Northwest, Inc. v. WorldCom, Inc.*, No. 01-35332 (9th Cir.); *BellSouth*, 278 F.3d 1223 (11th Cir. 2002), *petitions for rehearing pending*.

Ameritech attempts to manufacture a split on this question by arguing that the Federal Communications Commission ("FCC") in *Starpower Communications, LLC v. Verizon South Inc.*, File No. EB-00-MD-19, Mem. Op. & Order, FCC 02-105 (rel. Apr. 8, 2002) (*Starpower II*), held that questions regarding

the interpretation of interconnection agreements arise under federal law. At the outset, Ameritech's claim that *Starpower II* justifies a grant of certiorari is premature, as the FCC's decision recently has been appealed to the United States Court of Appeals for the District of Columbia Circuit, *Starpower Communications v. FCC*, No. 02-1131 (D.C. Cir.) (appeal filed Apr. 16, 2002). In any event, nowhere in *Starpower II* does the FCC find that questions regarding the interpretation of interconnection agreements are governed by federal law. Indeed, in both *Starpower II* and another recent decision, *Cox Virginia Telcom, Inc. v. Verizon South Inc.*, File No. EB-01-MD-006, Mem. Op & Order, FCC 02-133 (rel. May 10, 2002) ("*Cox Telcom*"), the FCC expressly has concluded that state contract law principles govern the interpretation of negotiated interconnection agreements. As the FCC stated:

> In interpreting the interconnection agreements at issue in this case, we stand in the shoes of the Virginia SCC. We agree with the parties that Virginia law supplies the applicable rules of contract interpretation.

Starpower II ¶ 24; *see also id.* ¶ 23; *accord* Cox *Telcom* ¶¶ 20-21, 27 n.85. The FCC similarly rejected the same arguments under the Fourth Circuit's decision in *AT&T Communications of S. States, Inc v. BellSouth Telecomms.*, 223 F.3d 457 (4th Cir. 2000),that Ameritech makes here. *See Starpower II* ¶¶ 46, 48; *see also Cox Telcom* ¶¶ 24, 26.

For all the other reasons why Ameritech's petition should be denied, WorldCom respectfully refers the Court to its previously-filed Response and to the briefs it has filed in both

Verizon Maryland, Inc. v. Pub. Serv. Comm'n, Nos. 00-1531, 00-1711, and *Mathias v. WorldCom Techs.*, No. 00-878.

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